United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20095

C. F. Pruess, Sr., Executor of
Estate of Ida G. Archerd, deceased,
et al,

Appellants,

vs.

Stewart L. Udall, Secretary of
the Department of the Interior,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Brief for Appellants

C. F. Pruess, Sr. Pro se
1010 NW A Street
Grants Pass, Oregon
Proper Person Plaintiff
And Appellant in forma pauperis

STATEMENT OF QUESTIONS PRESENTED

I. The question is, where defendant applied a nonmetallic placer claim standard rule of "present marketability" for a valid discovery, to lode claims of limited occurrence intrinsically value metallic minerals without first publishing such intention as required, whether this Court may reverse, set aside, the defendant's decision and mandate issuance of patents?

2. The question is, where defendant has failed to prove the criteria of/costs of extraction, transportation, milling , etc. used to rest his decision to invalidate the claims, or prove there never would or could be any future market for the minerals, or to prove that no valuable mineral deposit could ever be found to develop a valuable mine on the property, or that the government's restrictions against sale of newly processed gold would never be removed, or that no subsidy or comparable relief ever would be offered gold miners; or WHERE APPELLANT'S UNFAVORABLE, OPPOSING, CONTRADICTORY, UNCONTROVERTED EVIDENCE, DEFENDANT'S ADMISSIONS AND PROPER INFERENCES APPLICABLE, ARE SUCH AS TO DETRACT FROM SUBSTANTIALITY, WHETHER IT CAN BE SAID THE DEFENDANT'S DECISION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE WITHIN THE MEANING OF THE LAW, AND IN THAT EVENT THIS COURT SHOULD REVERSE, SET ASIDE, DEFENDANT'S DECISION AND MANDATE ISSUANCE OF PATENTS?

3. The question is, where defendant applied the wrong standard rule for a valid discovery as respects lode claims like gold, silver, copper, molybdenum, gallium and titanium, must this Court hold defendant to the standard applied, or if not first duly published, must it measure sufficiency of the mineral deposits by the proper rule for discovery?

4. The question is, where defendant's counsel requested and received an order of dismissal of the charges against the WHOLE BLACKJACK CLAIM AND PATENT ISSUED, where the tunnel level proved depth and continuity of veins, whether the veins therein running into the adjoining Wildrose and Buckskin claims where they apex, themselves supported by substantial assays values, should ALSO VALIDATE THOSE CLAIMS FORTHWITH?

5. The question is, where defendant's employees failed to dig any shaft, or drill, or open up any one of the mineral deposits, in the face of appellant's mineral showing and of the Blackjack tunnel disclosing depth and continuity of the mineral veins, whether defendant's hearsay, guess, surmise, conjecture, should be given credence.

6. The question is, where it is undisputed that at least one mineral vein in rock in place is exposed within the limits of each claim with many appreciable assays values on both sides, which veins range from one to six feet wide and have an enviable location, which the claim owners felt justified expenditures in time, work and means with the REASONABLE PROSPECT of developing a valuable mine, and they have done much work thereon, and they and others feel it worth while to continue, whether they have met the requirements of the "unadulterated prudent man rule" of discovery.

7. The question is, where appellant, on a showing of indigency, was excused from personal appearance at the trial, and submitt-

al was to be by defendant presenting the whole administrative record to the trial judge, and no notice of the time and date of the first trial was given, and a serious question arises whether or not the whole administrative record was judiciously reviewed, and where, inconsistent with the opinion of this Court on remand, the trial judge permitted - in fact solicited - evidentiary statements by defendant's counsel in plaintiff's absence, de hors the record, and which presentment was unsworn to and no proper foundation laid for expert testimony on mining, which appears in the nature of a trial denova, and it appears the trial judge decided against appellant on the basis of counsel's unauthorized presentment rather than upon review of the whole administrative record, whether such amounts to such flagrant misconduct prejudicial to appellant, after two trials and two appeals, as to justify this Court to reverse, set aside, defendant's decision and mandate the issuance of patents, IN THE INTEREST OF JUSTICE?

8. The question is, where the government prosecuted a mineral contest administratively and acted as accuser, prosecutor, judge and jury of its own charges in, by, and before its own agency while it was a litigant, gains an advantage by cancelling and divesting plaintiffs' title and possession to real property, and quieted title, or removed the cloud of the mineral locations and caused forfeiture of improvements, established discovery spots, road and timber rights without any payment and by application of an improper standard of present marketability while the government prohibited sale of newly processed gold anywhere but requires it to be sold only to the United States at its 1934 price of $35.00 an ounce, and which administrative proceeding deprived appellants of adequately defending and asserting all rights arising out of their mineral application and/or germane to the contest, and refused to recognize lawful Oregon mining rules and the customs of the miners, and deprived them of rights reserved under P. L. 167, and where requests to transfer the case to Oregon were denied, and where there was no fair and impartial trial, and during all the controversy the United States requires annual assessment work to be done on each claim, whether such renders the contest unconstitutional?

9. The question is, where the old venue law compelled appellant to file suit for judicial review in the District Court for the District of Columbia, and while it was pending the venue law was changed so that such action might have been brought in Oregon, and such change is made for appellant's benefit, and where motions for transfer were made before and after the change, but which were denied, whether such denials under all the circumstances, denied appellant of an even chance with defendant, and of a legally protected right, and whether such denial amounts to an abuse of discretion, and a gross miscarriage of justice results, whether this Court should reverse, set aside, defendant's decision and mandate the issuance of patents?

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(4) JURISDICTIONAL STATEMENT

This is an appeal under Title 28, Section 1291 of the United States Code (1958) from the final judgment entered January 6, 1966, and from all intermediate orders of the District Court, dismissing plaintiffs' complaint for judicial review of defendant's decision August 22, 1961, entered in United States v. C. F. Pruess, Sr., Executor, et al, Contest No. 213 Oregon, before the Department of the Interior, which declared six lode mining claims in Oregon null and void for lack of a valid discovery. The jurisdiction of the District Court was invoked under Title 5 USC, Sec. 1009.

(5) STATEMENT OF THE CASE

Appellants, except C. F. Pruess, Sr., are heirs under the Last Will and Testament of Ida G. Archerd, deceased, and the owners of the lode mining claims involved in this dispute. C. F. Pruess, Sr. is the duly appointed, qualified and acting Executor of said estate now pending in the State of Oregon for Josephine County. He is in possession for the purpose of administering the assets and proceeds for the benefit of those entitled thereto.

The mining claims are located about ten miles from Grants Pass, Josephine County, Oregon, a railhead on the Southern Pacific Railroad with an all-year-round hard rock road, with ample timber and water available for mining. All around the area are many patented and unpatented gold, silver, copper, chrome and nickel mines. Just ten air miles northerly on the same Greenstone formation, is the Greenback Mine with

a reputed gold production exceeding three millions of dollars. Just thirty miles away is the only nickel mine and smelter operating in the United States (The Hanna Nickel Co.) During the world wars the area in and around Josephine County was the chrome producing center of the United States. The government's stockpile was located at Grants Pass. Since gold was first discovered around 1849, Josephine County, Oregon has been a steady producer until gold mining was curtailed. This gold producing area, with others, was squatted upon and claimed by the miners which resulted in the tacit consent of the United States that the customs and rules of the miners be preserved in the basic mining statute, Title 30 USC, Sec. 22-29, et seq.

In this environment appellants' lode mining claims were located. The Blackjack, Wildrose and Buckskin claims were located in 1920; the Oregon in 1928; the Little Mac, Big Mac and Big Rock claims in 1934. These claims adjoin and are contiguous each with the other and comprise a group commonly known as the "IDA MINE". There is no dispute that ten mineral deposits are exposed within the limits of the claims, at least one vein in rock in place on each claim. The veins range from one to six feet wide and are in three tunnels and in surface exposures. The assay reports of mineral values range up to $85.00 gold and silver, 7.20% copper, .58% molybdenum, .005 grams gallium, 1.25% titanium oxide. Other minerals also have been shown. At one time the owners actually operated a mill and extraction plant on the property. Public Law 208 in 1943 was largely responsible for curtailment. That was the Gold Mines Closure Act. Since

then only the annual assessment work required and development work, has been done.

Under Oregon Law an executor is not permitted to mine or operate a mine. It was found necessary and desirable on the passage of P. L. 167 July 23, 1955, to apply for patents. In this way mineral sufficiency could be settled, title and boundaries determined which would enhance the value of the property and place the same in the best shape for an estate sale and enable successors to continue and carry on development and mining the mineral deposits.

On March 25, 1957 application for patents to all of said lode claims, including the Blackjack lode claim and the lode system therein, was filed and the Land Office assigned No. 05396 Oregon. The necessary work was completed and the full price paid for the acreage involved. The Manager of the Land Office caused publication of the notice of the application. No adverse was made or filed. Patents to the full claims was requested.

On February 12, 1958 the United States filed a protest and initiated a mineral contest No. 213 Oregon, charging the lands were not mineral in character and that sufficient minerals were not found within the limits of the claims to constitute a valid discovery. When the mineral contest opened, the Government's Solicitor moved for, and was allowed, an order dismissing the charges against the Blackjack claim, (the full claim). The contest continued against the remaining claims involved. Thereafter, the Department, without any hearing or consideration of the application for patents, issued only half a patent to the said Blackjack claim, the

North Half thereof. Without request a copy of this half a patent was recorded. Arbitrarily, and without a full and adequate hearing and opportunity to protest and be heard, Interior denied a LODE PATENT to the South Half of said Blackjack claim, as well as to deny patents to the adjoining and contiguous Wildrose and Buckskin claims wherein apex the veins in the said clearlisted and allowed Blackjack claim. If the veins in the Blackjack claim were sufficient and the charges dismissed against the whole of said claim, then the same veins running into and apexing in the other said claims should, under the law of inferences, be allowed. No full and adequate opportunity is provided for litigating this issue administratively in the government's initiated mineral contest under Interior's regulations. No provision is made for filing cross complaints or counterclaims. No opportunity has been afforded to litigate all matters arising out of the application for patent and/or germane to the government's initiated mineral contest administratively. After four days' hearings the Hearing Examiner declared the six lode claims invalid for lack of discovery.

Successive appeals to the Director of the Bureau of Land Management and to the Secretary of the Department of the Interior, proved unsuccessful. Three petitions for reopening, reconsideration and reexamination, were denied. The right to, or insufficiency thereof, has never been adjudicated. The last petition was denied February 26, 1962. The action for judicial review was filed in the District Court in April, 1962. Thereafter, appellants' motions to relax the Court's Rule 4, for a copy of the administrative record on which the

appellants paid $408.00 but received no copy thereof, to transfer the case to the State of Oregon, and motion for summary judgment, were each denied. Appellants, except C. F. Pruess, Sr., Executor, were stricken for failure to comply with Rule 4. This was due to inability to pay Washington counsel. C. F. Pruess, Sr., while an attorney in good standing of the Federal and State of Oregon courts for over 40 years, was denied right to appear as attorney; he was allowed only to prosecute the case as "proper person plaintiff". A showing of inability to finance the costs of the litigation, was ignored.

On October 5, 1962 Congress passed P. L. 87-748 changing the venue law to permit citizens as appellants to file for judicial review in the state where the claims are located. A further motion to transfer the case to Oregon, was also denied.

On February 26, 1964, based upon appellants' showing, the District Court excused appellant's personal appearance at the trial and ordered that submittal be by the defendant presenting, and the Court receiving on appellants' behalf, the whole administrative record at the trial. Defendant so stipulated. No other form of procedure was ordered or requested.

On May 6, 1964, without notice to appellant of the trial, a trial was had as shown by the official transcript on file. While appellant could not be personally present, he could have had at least a bystander present to report on the proceedings. He was deprived of that right also. Appellant had insufficient time within which to file a motion

and showing for a new trial; so, within time, he requested additional time to file his motion and showing for a new trial: This was promptly denied by Judge Holtzoff: He also denied a further motion by appellant to set aside the judgment on the grounds of mistake, surprise and excusable neglect: Then, he also denied appellant's request for leave to appeal without prepayment of costs or give security therefor. On June 29, 1964, this Court of Appeals allowed a similar motion and the appeal became perfected.

The official transcript of the trial of May 6, 1964 discloses that the trial judge requested defendant's counsel to make a statement as though appellants were present, and to state the issues and appellants' contentions. Instead, it appears defendant's counsel espoused his own side of the case and it appears that the trial judge allowed counsel to inject improper matters into the trial which had the effect to influence the trial judge, himself a former attorney for the Lands Division. The District Court's earlier pretrial order was entirely ignored and appellants' contentions were not presented to the trial judge. It shows from the transcript that the trial judge did not consider or review the whole administrative record although his findings and judgment prepared by defendant's counsel, recited to the effect that he had considered the whole administrative record. Then and there at the trial, on defendant's counsel's request, the trial judge ordered the whole administrative record to be returned to counsel for defendant:

> Mr. Pittle: "That is alright. May I at this time ask for the return of the administrative record so

that you won't be bothered with it? It's gotten lost each time."

The Court: "Yes, we don't want to keep it here. You may return it to counsel, Mr. Clerk."

On November 19, 1965 this Court rendered its opinion and entered judgment reversing the District Court and remanded the case for further proceedings not inconsistent with its opinion. The opinion discussed the matter of transfer of the case to Oregon and made the rule of the case. The Court concluded that the trial judge had not considered or reviewed the whole administrative record and directed him to do so. No other form of procedure, or request, or order for trial on remand was provided.

On January 6, 1966 the District Judge (Holtzoff) again dismissed plaintiffs' complaint and his findings and judgment again are to the effect that he had considered the whole administrative record: However, his opinion shows the trial was on January 3, 1966 and his opinion is dated the following date, January 4, 1966. The whole administrative record consists of an application for patents with several assay reports, maps and reports, over 100 pages, also two volumes of transcribed testimony of witnesses at the mineral contest, over 100 assays of mineral values, maps and plats and ore specimens. No judge could judiciously consider and review that record within the day or next day.

Appellant's motion for a new trial was again denied. His application for leave to appeal without prepayment of costs or give security therefor, was also denied. On March 31, 1966 this Court again allowed appellant's motion for

leave to appeal without prepayment of fees or give security therefor. The record is now supposed to be docketed and filed and the case now pending in this Court.

STATEMENT OF POINTS ON WHICH APPELLANT RELIES

INTRODUCTORY

Pursuant to the Administrative Procedure Act, Title 5 USC sections 1001-1011, the Court shall decide all relevant questions of law, interpret constitutional and applicable statutory provisions, and determine the meaning and applicability of standards and rules applied or of the terms of any agency action, unlawfully withheld or unreasonably delayed, and hold unlawful and set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, contrary to constitutional right, power, privilege, or immunity, in excess of statutory right, without observance of procedure required by law, unspoorted by substantial evidence, unwarranted by the facts. IN MAKING THE FOREGOING DETERMINATIONS THE COURT SHALL REVIEW THE WHOLE RECORD OR SUCH PORTIONS THEREOF AS MAY BE CITED BY ANY PARTY, AND DUE ACCOUNT SHALL BE TAKEN OF THE RULE OF PREJUDICIAL ERROR.

ARBITRARY CHANGE OF PRUDENT MAN RULE OF DISCOVERY, APPLIED BUT NOT PUBLISHED

SUMMARY OF ARGUMENT

Interior and defendant arbitrarily changed the time-honored "prudent man" rule of discovery by adding a separate and additional standard of present "marketability" (profitability) as a new concept. This was in face of the low price the government pays for gold and its restrictions

against the citizen's sale of newly processed gold anywhere in the world, and in face of higher costs to produce gold, and other unfavorable economic conditions. This standard rule was applied as a general proposition and particularly against appellants without first pub l ication thereof in the Federal Register as required by law.

ARGUMENT

The Administrative Procedure Act permits rule and standard making but they must first be duly published, otherwise they are unenforceable. The Secretary must go on record for what he requires and intends to enforce. The citizen must have notice and opportunity to oppose, resist and to be heard. In this case such standard rule was not first published and is unenforceable: Moreover, the proponent of the standard rule has the burden of proof. Defendant failed to prove such required publication. Title 5 USC, Sections 1000-1011: Title 44 USC, Sec. 303, Pincus v Reilly, 157 F. Supp. 549: Hatch v U. S., 212 F. 2d, 28: Graham v Larrimore, 185 F. Supp. 763: U. S. v Morelock, 124 F. Supp. 932.

Nothing really need be said in the case at bar because it appears quite clearly that Interior's policy was to apply its coined standard rule of present marketability as a general proposition.

In September, 1962, Mr. John A. Carver, Assistant Secretary of the Interior, in a speech before the American Mining Congress at San Francisco, is reported to have said,

> "The Department continually reiterates that it consistently adheres to the prudent man rule as a test for determining validity of discovery in mining claims located under the general mining laws of 1872: Nevertheless, from a review and

> comparison of the decisions of today as against those of yesterday, it is readily apparent that the concept of prudence has undergone a radical change and is unquestionablymore strict today than previously. While the rule appears unchanged, the criteria now required to show a valid discovery have become much more strigent.
>
> In the other instance we found ourselves bound by an interpretive standard of the mining laws which constituted a separate and additional standard to the prudent man rule laid down by Judge Lindley. In it we found the doctrine of present marketability carried to the extreme of rejecting good judgment and common sense." - He then goes on to discuss other aspects of the mining laws. See Congressional Record No. 175, Sept. 27, 1962 sixth paragraph, column one, p. 19974.

Denison v Udall, 248 F. 2d, 942 decided Dec. 13, 1965 (unknown when the two trials herein were held) indicates conclusively Interior's and defendant's intention to apply said standard rule of present marketability to lode mining claims of limited occurrence, and intrinsically valuable metallic minerals, as well as to placer (loose dirt) claims. See that case, please.

On September 20, 1962, Mr. Frank J. Barry, Solicitor, United States Department of the Interior, sent an advisory memorandum to Assistant Secretary Public Land Management, Subject, Review of the "marketability rule" as applied to the law of discovery. The full text of the opinion appears in the appendix p. 1, from which we quote the 4th paragraph.

> "The marketability rule about which you have particularly asked our views, is merely one aspect of this test. The Department and the courts have, we believe, rightly held that a prudent man would not be justified in developing a mineral deposit if the extracted minerals were not marketable. This marketability test IS IN REALITY APPLIED TO ALL MINERALS, although it is often mistakenly said to be applied solely to nonmetallic minerals of wide occurrence. Many minerals are deemed intrinsically valuable.
>
> An intrinsically valuable mineral by its very nature is deemed marketable and therefore merely showing the nature of the mineral usually meets the test of marketability." ---- (Caps mine)

On July 17, 1964, H. R. Hochmuth, Associate Director of the Bureau of Land Management, in a speech before the Rocky Mountain Mineral Law Institute assembled at Salt Lake City, Utah, is reported to have said,

> "There can be no gainsaying that the mining law of 1872 is not administered as it was originally written and intended. There has been a definite trend in decisions towards more stringent requirements to establish the validity of a claim. The requirements are innovations which have been superimposed on the basic law by the need for standards which can serve to prevent the subversion of the law for non-mineral purposes. Examples of these may be found in the narrowing application of the rule of discovery, the employment of the rule of marketability...
>
> The marketability test is a relatively simple concept.... For metalliferous minerals, the consistent holding has been that it is not necessary for the mineral to be found in paying quantities or of commercial value: However, in Layman v Ellis, supra, a 1929 decision, it was held that a discovery of commonplace minerals would validate a placer claim only if it were shown that the mineral could be mined at a profit. In other words, the term "valuable mineral" was equated with "profitable market" insofar as that term applied to commonplace minerals. Foster v Seaton established that the profitable market must be an existing one rather than a prospective one." (Underscore mine)

We observe this is a type of sneak rule - the hidden ice berg thing: Actually, under the guise of applying the "prudent man" rule for a valid discovery, they say one thing but mean another: They mean to require demonstrated proof of present operation and present marketability or profitability as regards lode claims as conditions precedent to location and/or patent of lode mining claims. In the case at bar it is made crystal clear that the separate and additional standard requiring demonstrated proof of present marketability and present operation, of an already adequately exposed deposit of valuable minerals, must be demonstrated to a certainty that they are conducive to the PRESENT establishment of a mining operation, a paying mine

on the property. Defendant adopted the conclusions of the Director of the Bureau of Land Management who said on page 5, paragraph 3 of his decision:

> "By their patent application the contestees asserted they had complied with the applicable mining laws and the claims had been each validated by discovery. See Foster v Seaton, 271 F: 2d, 836 (1959). Conceding that mineral bearing veins have been exposed on each claim, the question for determination is whether the evidence of mineralization indicates the existence or probable existence of valuable mineral deposits. Where the total value of stringers, veinlets, pods or lenses on a claim may weigh a few hundred pounds and they could weigh a ton or more, "and even though the ore may assay $85.98 a ton, and the cost of extraction, transportation, milling, etc. exceeds the recoverable values, a prudent man would not be justified in the further expenditure of labor and means in an attempt to establish a paying mine on the property; in such event a discovery of valuable mineral deposits" has not been demonstrated and the claims are null and void for lack of discovery. The evidence adduced concerning each and every one of the six claims shows to a certainty that the known visible deposits are not conducive to the establishment of a mining operation on any one of them which could even justify the costs of extraction."

We pause to say that the reference to our mineral deposits consisting of merely stringers, veinlets, pods and lenses is, we think, an unfair portrayal and misrepresentation: Even so, the law does not exact any degree or extent of mineral exposure but only a mineralized vein, is required. Interior officials did not dig or sink any shaft, or drill, or do any work on any one of the mineral deposits to prove what they say or to prove that the deposits do not improve with depth. WE ASK THE COURT TO GIVE FULL CREDIT TO THE INFERENCE THAT ALLOWANCE OF THE MINERAL VEINS IN THE PATENTED BLACKJACK CLAIM proves depth and continuity. Many successful mines have started with even less mineral showings than what the record here shows. The average little man miner never gets to mill and extract his minerals: That is left to the

big operators. It's a matter of common knowledge that it requires lots of money to dig shafts and adits to reach the ore bodies which do get wider and richer with depth, but the average miner cannot do those things and the law wisely does not require him to do so for location and patent purposes. But, we ask, look at the record: Even the Hearing Examiner recognized a vein of at least 1,000 feet exposed, and one six feet wide, and one assay of at least $85.00 p.t. gold-silver. Please note what he said on page 2, paragraphs 2 and 3 of his decision.

On page 12 of his brief on the first appeal, defendant's counsel said:

> "The requirement of present market value IS NOT A CHANGE IN THE MINING LAWS OR A CHANGE IN REGULATIONS requiring publication in the Federal Register... This question has been ruled on by this Court in Foster v Seaton, 106 U. S. App. D.C., 253, 255: 271 F. 2d, 836, 838 (1959) where it was stated: "THUS, SUCH A MINERAL LOCATOR OR APPLICANT, TO JUSTIFY HIS POSSESSION, MUST SHOW---EXISTENCE OF PRESENT DEMAND, AND OTHER FACTORS, THE DEPOSIT IS OF SUCH VALUE THAT IT CAN BE MINED, REMOVED AND DISPOSED OF AT A PROFIT." (Caps mine)

Long ago Interior announced its prudent man rule of discovery. In Castle v Womble, 19 L.D. 455, the rule is stated:

> "--where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditures of his labor and means, WITH A REASONABLE PROSPECT OF SUCCESS, IN DEVELOPING A VALUABLE MINE, the requirements of the statute have been met. To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby "all valuable mineral deposits in lands belonging to the United States...are...declared FREE AND OPEN to exploration and purchase, for if, as soon as minerals are shown to exist, and at any time during exploration, before the returns become remunerative, the lands are to be subject to other disposition, few would be found willing to risk time and capital in the attempt to bring to light minerals concealed in the bowels of the earth, as Congress obviously must have intended the explorers should have proper opportunity to do. " (Caps mine)

This rule has been followed by the courts, see Chrisman v Miller,

197 U.S. 313: L ed. 770; currently in Best v Humbolt Placer Mines, 371 U.S. 334; 9 L ed. 35; recently in Denison v Udall, 248 F. Supp. 942 (Dec. 1965) as regards lode claims of limited occurrence of intrinsically valuable minerals.

It is readily apprent that the prudent man rule of discovery has been changed. The added standard requiring proof of present marketability and profitability, the new concept, is inconsistent with the above stated prudent man rule and the basic mining statute which provides:

> "Title 30 USC, Sec. 22. "Lands open to purchase by citizens.
> Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, SHALL BE FREE AND OPEN to exploration and purchase, and the lands in which they are found, to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, AND ACCORDING TO THE LOCAL CUSTOMS OR RULES OF MINERS IN THE SEVERAL MINING DISTRICTS, as far as the same are applicable and not inconsistent with the laws of the United States." (Caps mine)

We look in vain for language, either in said basic mining statute or in said Castle v Womble (1894), the prudent man rule, for requirement of present marketability or profitability, or for a "sure-thing" mineral deposit, or for exposure of ore ready to MINE. We believe there is an irreconcilable difference in the philosophy between the two rules. This is indicated by Castle v Womble where contradiction is shown:

> "There are two tests to determine whether a discovery has been made. The particular test to be applied depends upon the character of the minerals involved. Where the minerals are of limited occurrence, and in and of themselves have intrinsic value, such as gold, the "prudent man" test set forth in Castle v Womble ...is applied. All that is required to validate a claim for minerals found within the claim would justify a person of ordinary prudence in the further expenditure of his labor and means

> with a reasonable prospect of success in developing a valuable mine. No showing that the ore is marketable is required. " U.S. v. John D. Stack, A-28157 (1960). See also Val Payne, Minerals Staff Officer, BLM, Examination of Mining Claims and Compliance with law, 5th Annual Proceedings of Rocky Mountain Mineral Law Institute, 1960, p. 170: Speech of Karl Landstrom, Director of BLM to American Mining Congress in Seattle, Washington, September 12, 1961."

The history of the future event theory of the prudent man rule of discovery may be traced to Costigan on Mines. On page 133 it is said:

> "The fact that the term "mineral deposit" cannot be considered apart from the word "valuable", and that the full term "valuable mineral deposit" is not used in any technical mineralogical sense but, like the term "fixture" in the law of real property, has a flexible meaning according to the circumstances of the given case, and particularly to the situation of the contending parties."

On page 155 he says:

> "It is a rare claim that is a paying mine at the grass roots, or where the paying vein is first found at or near the surface. The history of the mining countries has shown that in the vast majority of cases, years of toil and thousands of dollars have been required to demonstrate that a mineral vein will pay to work: Must the miner await large development and tremendous expenditures before he can take the first steps by locating and recording to secure to himself the right of possession, and of a grant from the government when the great mine is developed? I think not."

The dispute as it centers around Foster v Seaton as authority, is without foundation. On July 23, 1955 Congress saw fit to remove sand and gravel nonmetallics from mineral locations. Failure to publish intention to apply the placer claim rule to lode claims of limited occurrence and instrinsically valuable minerals like gold, etc., thereby depriving citizens of the opportunity to resist or oppose its application to lode claims, is what is illegal.

Lode mining calls for deep mining, length adits and underground workings, erection of mills and extraction plants, all with such heavy expenditures that lode mines owners should have been given the opportunity to be heard against application of marketability to lode claims.

Bwsides abrogating the "prudent man" rule and the decisions of the courts endorsing that rule, this Court should be aware of the fact that the marketability or profitability rule has a nugatory effect upon the purpose and intent of the Mining Law of 1872. Please see Sec. 2181, Title 50 USC, Congressional Declaration of Policy, where it is said:

> "It is recognized that the continued dependence on overseas sources of supply for strategic or critical minerals and metals during periods of threatening world conflict or of political instability within those nations controlling the sources, the supply of such materials gravely endangers the present and future economy and security of the United States. It is therefore declared to be the policy of the Congress that each Department and Agency of the Federal Government charged with responsibility concerning the discovery, development, production and acquisition of strategic or critical minerals and metals, shall undertake to decrease further, and to eliminate where possible, the dependency of the United States on overseas sources of supply of each such material."

The courts to a great measure have been mesmerized by so called "expertise" of government officials and attorneys in mining matters. This is because countless number of citizens too poor or too fearful to resist or sue, have been frightened away and have not fought for their rights or brought to light the mistakes and errors of Interior in the administration of the mining laws. What happens to the initiative of the prospector when he knows that his claim may be attacked and taken away from him because he cannot demonstrate a paying mine or cannot afford to operate

a mill or extraction plant in face of the low price the government pays for gold (1934-$35.00 per oz.) and in face of the government's restriction against the citizen selling his gold elsewhere where he may get even $105.00 an oz. and protect his rights, even though he would, if not so handicapped, be willing to continue expending time, labor and money into exploration and development upon the discovery he has made? In Shreve v Copper Bell Mining Co., 28 Pac. 315, 323 (1891) the noted mining jurist said:

> "Without prospecting there will be no discovered mines. Without the privilege to claim and locate and hold a discovery, there will be no prospecting. A prospect not once in a hundred times is a mine in sight. If the locator must show a paying mine at location, the riches in these mountains are a locked treasury. The law does not contemplate this...It is a rare claim that is a mine at the grass roots, or where the paying vein is first found at or near the surface. The history of the mining countries has shown that, in the vast majority of cases, years of toil and thousands of dollars have been required to demonstrate that a mineral vein will pay to work."

Where financing is important to the development of a mineral discovery, the lack of a patent may preclude the obtaining of adequate funds. And what happens to the security of a mining claim when the marketability rule expands to include more and more variables in the determination of profitable marketability?

The effect of the Mining Laws of 1966 and 1872 was to encourage the search for, discovery and development of, our nation's mineral resources. The effect of the marketability rule as applied, discourages search for, discovery and development, particularly of the lower grade ores, or in areas where the ore bodies are buried under deep overburden, and the exploratory activities of the small operator. The discoverers,

locators, and claim owners want to be able to continue to rely upon the offer and reward conferred by the basic mining statute, and to develop and hold onto the discoveries and claims located, even though prices, costs and economic conditions and restrictions do not justify actual mining. THE MINER DOES NOT HAVE TO MINE. He may do his annual assessment work, develop and hold his minerals for extraction when conditions justify. The defendant would have the mine owner actually erect a milling or extraction plant in face of adverse conditions over which the miner citizen has no control. What is prudent, honest or fair about that? Gold, silver, low grade copper, manganese, chrome and uranium are minerals particularly affected by economic conditions: Yet, why curtail search for, exploration and development because zealous Interior officials want to have more control and eventually get the citizen's mineral lands back into federal control without any payment. Most claim owners would be glad to turn over their mining claims for a reasonable pay if an emergency really required.

This concept of marketability first started about 1933 as we glean from the reports. See Layman v Ellis, 52 L. D. 714 (1929) which approved a mineral location of sand and gravel. There developed objections thereto. Since about 1933 the Secretaries through their solicitors, lean to the rule of marketability announced in Foster v Seaton, supra. But the point is that they have applied the change, the added standard requiring proof of present profitability to LODE MINING CLAIMS OF LIMITED OCCURRENCE, AS WELL AS PLACER CLAIMS OF WIDESPREAD OCCURRENCE, WHICH DO NOT MEET THE TEST OF INTRINSICALLY VALUABLE MINERALS: BECAUSE THEY HAVE DONE THAT, THEY MUST BE HELD TO FIRST PUBLISH THE APPLICABLE AND INTENDED RULE IN THE FEDERAL REGISTER. THIS THEY

HAVE NOT DONE OR PROVED AND THEREFORE THE RULE IS NOT ALONE UNENFORCEABLE BUT DEFENDANTS INVALIDATING DECISION MUST BE DECLARED VOID, THE JUDGMENT REVERSED, AND THE COURT SHOULD NOW MANDATE ISSUANCE OF PATENTS.

If the Court is not so disposed to hold as requested, then appellant presses upon the attention of the Court the following points, viz:

ARGUMENT

Failure of Proof: No Substantial Evidence:

At the outset, to negate substantiality we ask the Court to consider certain admissions against defendants interest and proper inferences to be drawn from facts proved:

1. Failure to first publish the placer claim rule requiring demonstrated proof of present marketability or profitability.

2. Failure to prove at any time that such notice was first published in the Federal Register as required by law or that it was intended to be applied to lode mining claims.

3. While defendant's witness Susie, attempted to use the costs criteria, he failed to prove what the costs of extraction, transportation, milling, etc. were, on any mineral deposit on any claim. The criteria upon which defendant rested his conclusions to invalidate the claims, was never proven. Susie said he had never worked in, or operated a mine in Josephine County, Oregon. (Page 231, transcript, Contest)

4. Failure to prove there never would or could be a future market, gold price rise, subsidy or comparable relief, or that the restrictions now existing against sale of newly processed gold anywhere in the world, would be removed, or that no mineral deposit ever could be developed on the property; or that the harsh, unreasonable, unworkable rule of present marketability or profitability, ever would, or could be lifted.

5. Failure to dig any shaft, drill anywhere, or work on any mineral vein or deposit to support defendant's conclusions of mineral sufficiency.

6. Failure to rebut by probative, reliable and substantial evidence, the inferences flowing from defendant's request for an order of dismissal of the charges against the Blackjack Claim as a whole, admitting sufficiency of the mineral veins in the Blackjack tunnel, and in favor of the adjoining and contiguous Wildrose and Buckskin Claims from which run, and where apex, the veins in the said Blackjack claim and tunnel.

7. Admission that the LANDS ARE MINERAL IN CHARACTER. Ex. Dec. Jan. 12, 1960.

8. Admission that "A review of the entire record in this case indicates that even though enough minerals have been found to warrant further exploration of these claims"--- (Defendant's decision, p. 3 and 4. Aug. 22, 1961.

9. Admissions of defendant's counsel at the first trial and the trial judge's reliance thereon:

"THE COURT: "In other words, the presence of a mineral is not enough unless it is such as would make it worthwhile to spend money TO MINE: Is that it?

MR. PITTLE: "THAT IS CORRECT. SPEND MONEY TO MINE IT, THAT MEANS, DEVELOP IT." See transcript page 8, first trial. (Caps mine)

To measure substantiality of defendant's evidence, we must observe the standard rule he applied: We must also know the proper standard rule that is applicable. Interior promulgated, and defendant applied to the lode claim case at bar, the placer claim rule of Foster v. Seaton (nonmetallic of widespread occurrence) requiring demonstrated proof of present marketability and other factors there stated. We claim that was improper. We claim the proper standard rule to be applied to appellant's case is stated in Castle v Womble, supra, and now announced in the landmark case of DENISON V UDALL, 248 F. 2d. 942, decided by the District Court of the United States for the District of Arizona last December 13, 1965: (It was unknown to us at either trial). That case involves lode (hard rock) claims of metallic values of limited occurrence: There also the government had applied the placer rule of present marketability. The Court there considered the cases originating the placer rule of marketability. The Court also considered Castle v Womble and others involving metallic, intrinsic value minerals of lode claims of limited occurrence. The Court in Dennison held "THE STANDARD APPLIED BY THE SOLICITOR WOULD APPEAR APPLICABLE TO COMMON-OCCURRENCE NONMETALLIC MINERALS CLAIMS, BUT NOT TO THE METALLIC

MINERAL CLAIMS IN THIS CASE." (Caps mine) See 30 U.S.C.A., Sec. 611 for expression of Congressional intent on this same line. NOW THE MANDATE OF THE FEDERAL COURT IS THAT THE STANDARD RULE REQUIRING ONLY A FUTURE PROSPECT OF SUCCESS, IS THE TEST TO BE APPLIED TO LODE CLAIMS OF METALLICS OF LIMITED OCCURRENCE. The Solicitor was reversed, the case remanded to the Department for further evidentiary proceedings on the issue of future prospect of success of manganese minerals. We think that the showing in the case at bar eliminates remand because the case at bar involves gold, silver, copper, molybdenum, gallium and titanium, intrinsic, valuable minerals concerning which the Court may take judicial notice of the depleted quantity of such metals and the low price paid for them and the current unsavory economic conditions; the need for replenishing the stocks is obvious and a matter of common knowledge especially in time of war or present emergency and the hazards of foreign shipments of such minerals and metals. The Court may also take judicial notice of the low price paid by the government for gold, $35.00 an ounce and for silver which, in face of threefold costs to produce, demands a price rise or relief and the Court may take judicial notice that some time the restriction against the sale of newly processed gold may be removed so that gold may be sold may be sold anywhere for more than $35.00 an ounce.

The guideline rule is that the Court is precluded from sustaining a decision merely on the basis of some evidence which, in and of itself, justifies it. The decision must be based on the RECORD AS A WHOLE AND NOT SIMPLY ON THOSE PARTS OF IT REGARDED AS FAVORABLE TO THE ADMINISTRATIVE CONCLUSION. Shaw v. Celebreeze, 245 F. Supp. 573; Rechary v Roland, 235 F. Supp. 79; Oil Shale Corp. v Udall, 235 F. Supp. 607, and cases here following.

All unfavorable, opposing, contradictory, uncontroverted evidence, DEFENDANT'S ADMISSIONS AND ALL PROPER INFERENCES FROM FACTS SHOWN WHICH SO DETRACT FROM SUBSTANTIALITY OF THE DECISION, must be considered judiciously as it cannot be said the decision is supported by substantial evidence. Universal Camera Co. v N. L. R. B., 340 U. S. 474, 497; Motor Express v U. S. 119 F. Supp. 298; O'Leary v Brown, 340 U. S. 504; Goldman v Folsom, 246 F. 2d, 776; Wells v Celebreeze, 209 F. Supp. 444.

> "Substantial evidence is more than a mere scintills. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Consolidate Edison Co. v N. L. R. B., 305 U. S. 197.

> "Accordingly it must do more than create a suspicion of the existence of the fact to be established... It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

Universal Camera Co. v N. L. R. B., supra, 95 L. ed. 456; Cummins v Celebreeze, 222 F. Supp. 285; C. E. Niehoff v F. T. C. 241 F. 2d, 42.

The government's request, and the order allowed, for dismissing the charges from the Blackjack tunnel claim and/issuance for of patent, means the whole Blackjack claim: It was not partitioned and carries with it the proper inference that the veins in said Blackjack tunnel claim running from, and apexing in the adjoining and contiguous higher ground of the Wildrose and Buckskin claims, are sufficient there also. Mr. Susie, the government's witness, engineer and mineral examiner, testified - "I would say the formation on the Blackjack and Wildrose are similar and part of the Buckskin." Page 222 Trans. Mineral Contest. In addition, the assays of mineral values on each of those claims, and the exposures, proved to justify a prudent man to make further

expenditures with the reasonable prospect to reach those veins in the Wildrose and Buckskin claims at the same depth as the Blackjack tunnel level. They should be allowed forthwith. The application for patent includes request for patent to the lode system in the Blackjack Claim. That consists of several parallel veins, angles, spurs and variations. No adverse was made in the proceeding to the Manager's notice advertised. No opposition was made by anyone. Even though the lode system was in the South Half of the Blackjack claim (which is also in the North Half of the alleged prior patented Pelton Placer claim, patent could be issued to the lode within the placer. Title 30 USC, Sec. 29. This follows originally announced in Iron Silver Mining Co. v Reynolds, U.S., 31 L. ed 466. See Morrison's Mining Rights, 16th edition. In U. S. v Alstrom decided by Interior, Dec. 16, 1960, it held:

> "Any positive reading on an instrument for disclosing radioactivity, is sufficient to indicate the possibility of a subsequent discovery of commercially valuable ore, and may impel a practical prospector to conduct a further search for more valuable ore." Also see 29 I.D. 12: 27 I.D. 129: 52 I.D. 575.

The Court should also note that where ten valuable mineral veins have been exposed as the record shows, it is a different matter when considering prudency than when there are no veins or deposits exposed at all, or where they have been mined out. Under the stated Alstrom rule, supra, the very fact that we have so much valuable mineral deposits exposed, seems to justify under the inference rules - the right to continue with expenditures with the reasonable prospect of developing more of the same ore and at depth as proven in the Blackjack claim and tunnel.

There is no dispute that the width of our veins range from

one to six feet: That the exposure in the Blackjack tunnel is around 1,500 feet; that the mineral veins have depth and continuity; 55 feet in the Wildrose, 35 feet in the Buckskin, 300 feet in the Big Rock, 90 feet in the Little Mac tunnel, 90 feet in the Big Mac tunnel: That the claims constitute a group; that they are located about 10 miles from Grants Pass, Oregon along an all year around hard rock road and that ample water and timber are available for mining purposes. The record established conclusively the fact that at one time, and until 1943 when the P. L. 208 gold mining closure act curtailed operation, there was a 40 t.p.d. milling and extraction plant on the property. See appellant's application for patent supposedly in the administrative record. This plant was electrically powered above surface and in the underground workings.

Hearsay, mere guess, opinion not founded on facts, conjecture and suspicion does not measure up to evidence and cannot take the place of evidence. See pages 53, 91, 151 where Mr. Susie attempted to establish costs but did not prove what the costs were. See also his testimony on pages 54,61,89, 151, 286, 398, 399, 417, 454, 515, 518, 586, 648 of the transcript of the mineral contest which, first, prove that the standard of marketability was injected at the trial and second, that we objected to the application of such rule from the beginning. Heated arguments with the Hearing Examiner followed resulting in allowance of standing objections and rulings to the same questions: But this created prejudice against appellant. Bear in mind also that no requirement is made of any extent of exposure of minerals.

In passing we point out also that the trial judge was mesmerized into a sense of false expertise by believing what

defendant's counsel told him was the applicable law

Interior and the defendant "jettisoned" all opposing contradictory evidence. Though appellant had to pay $408.00 at the contest hearing towards the government's costs to prosecute its charges, no copy of the transcript of testimony was given to appellant. His motion before the trial Court for a copy was also denied: However, from his notes and those of his engineer witnesses, appellant requests the Court to read the testimony, especially that on pages 2, 15, 20,23,25,32,34,73,76,78,81,82, 87,88,99,100,102,103,104,105,106,107,109,128,133,145,148,151, 157, 158,159,167,174,176,177,178,182,192,196,199,207,211,212,213,215, 216,222,231,241,251,277,278,279,281,285,294,295,296,297,305,308, 315,321,326,330,332,334,336,345,348,349,351,361,368,392,394,395, 398,399,402,404,405,411,412,416,434,425,427,438,441,442,454,457,462 462,463,465,496,498,504,506,507,526,561,562,568,569,573,582,583, 584,610,644,647,648,651,662,671,672,673,674,675,676,677,691,704.

At the time of the contest hearing appellant's witnesses, Jean Presslar and George Heikes were ex-government engineer employees. Each had been over the claims and were conversant with the work being done. Jean Presslar made many assays of samples taken from the claims. These appear in evidence. Exh. M and W. He testified that in every case we have enough mineral to justify a prudent man in further expenditures with the reasonable prospect of producing a paying mine. Tr. p. 583. On cross examination he was asked which claim. He said "I stated each and every - then I repeat as to each the same answer." Tr. p. 583. He said the Blackjack tunnel could be used to service the Wildrose, Buckskin and Big Rock. Tr. p. 564. Also across the creek, the Little Mac and Big Mac by the Little Mac tunnel. Tr. p. 586. He said a mining man would be spurred on. Tr. p. 561. He said

.58% molybdenum, estimated value $14.50, would be a creditable showing. He said he would sink on the highest mineralized part. Tr. p. 648. On questioning by the Hearing Examiner, Presslar said that by rule of thumb $10.00 ore would start a removal operation. Tr. p. 651. He added - "The showings of these veins justify going ahead to do further work to find the kind of ore we have been talking about - yes it does."

George Heikes, a former evaluation engineer for the government said he mapped the mineral deposits. Tr. p. 669. He also said a prudent man would be justified in spending further time and money to work the claims. Tr. p. 670, 671, 672, 674, 675.

C. F. Pruess, Jr., appellant's witness, testified to the same effect. Tr. pgs. 398, 424, 454, 398, 397, 427.

Walt Cannon and Len Ramp, Oregon State Geologist at Grants Pass, corroborated the statements of appellant's witnesses. Cannon was asked on cross examination - "Is there anything exposed on any one of these claims which would lead you to believe that if it went $15.00 ore, that you are in business?" Answer, "Yes". Tr. p. 124. WE REPEAT HERE THAT AGENCIES ARE NOT AUTHORIZED TO ARBITRARILY DISBELIEVE CREDITABLE WITNESSES. West Federal Practice, Ch. 2, sec. 103, p. 79.

Since we have shown that the proper applicable standard rule is not the adulterated standard rule requiring demonstrated proof of present operation and present marketability or profitability, the testimony of the government's witnesses should have little or no weight. We think that defendant's admissions of assays of samples taken recklessly from mineral deposits on appellant's claims, nevertheless clearly demonstrates that valuable mineral deposits have been exposed and certainly justify a prudent man to make further expenditures with the prospect of developing

other comparable valuable, or even greater value, ores and meets the requirements of the "realistic prudent man rule" for a valid discovery. Some of the assays of mineral values are:

Appellant's		Wildrose	Defendant's	
$85.98	$18.00		$47.51	$43.90
21.70	11.20		43.15	12.97
14.00	10.15		14.70	6.91
9.28	6.72		5.88	4.76
5.60	4.66	Titanium 1.25% oxide.		
Above assays all gold and silver				

		Buckskin		
22.40	5.05		1.48%	1.19%
gold - silver			.44%	.32%
24.00	23.00		copper	
13.50	14.35		9.00 copper	
gold-copper			1.80 gold	
3.98%	3.98%			
7.20%	5%			
copper (1% equals 20 lbs.)				

		Little Mac		
45.95	28.35		22.91	13.77
8.05	3.37		4.34	3.50
2.59	1.75		gold-silver	
gold-silver				

		Big Mac (Upper tunnel vein)		
29.40	15.84		9.43	8.01
gold-silver			6.70	3.63
			gold-silver	

		Discovery Vein		
24.00	14.45		.36%	.40%
gold-silver			.32%	.23%
			copper	
			.58%	.24%
			molybdenum	
			Estimate value	
			$14.50	
			See assay report	

in pretrial order b,c,d,e,g,h,k,l,n,o p,u,v,w,x and y.

BIG ROCK-OREGON

These claims are significant in view of the gallium and other rare metals possibilities. While there has been shallow exposures for over 300 feet, gallium assays has shown values .002 grams .004 grams and .005 grams (government assays). The vein is 2½ to 3 feet wide estimated gallium value$75.00 to $100.00 and $3.00 gold-copper-nickel. We point out to the Court that in a very real sense the assays shown above are considerably better than the assays shown in many of the case reports: Moreover, we feel that they answer Mr. Susie's "break-even" point. This, even though the assays come from shallow workings.

We ask the Court to consider the testimony of Mr. Susie for the government appearing on pages 53,54,61,62,89,93,151, 286, 398,399,417,454,515,518,586,648 of the contest transcript. While guess, surmise, estimate, etc. was given, such is hearsay and not evidence of the facts or even of costs to extract, transport, mill, etc. They do, however, corroborate appellant's claim that the defendant used the conclusively demonstrated present mineral profitability requirement to MINE rather than show prospect of future success.

Defendant saw fit to dodge Interior's previous decisions contrary to, and inconsistent with, the standard rule he applied. Please see U.S. v. Utah, 34 I.D. 435; Freeman v Summers, 52 I.D. 205; Warner v Eastman, 34 I.D. 123, where the department held that evidence of costs of quarrying, transportation, milling, etc. is UNRELIABLE AND UNCONVINCING. MINERAL SUFFICIENCY SHOULD BE LEFT TO DETERMINATION DEPENDENT UPON CURRENT ECONOMIC CONDITIONS AND SUBJECT TO CHANGE AND CHARACTER WITH THE SHIFTS IN ECONOMIC SUPPLY AND DEMAND." Also see U.S. v Smith, 66 I.D. 173 (1959). There were assays of high and low mineral values. It was held:

> "Certainly they show that the quartz carries valuable mineral deposits and they are proper evidence to be considered in arriving at a conclusion as to whether a prudent man would be justified in going ahead with the development of the claims. The mining laws do not require, as the Forest Service suggests, that the values shown must be such as will demonstrate that a claim can be worked at a profit or that it is more probable than not that a profitable mining operation can be brought about."

We also quote from U. S. v Mouat, 61 I.D. 282:

> "It does not follow that because there is no clear profit arising from the sale of an article that has been manufactured or produced, that it

> has no commercial value. Take, for instance, the farmer. In the case of husbandry it frequently happens that different crops raised by the farmer, when out in market, do not sell for enough to pay the costs of their production and transportation, but can it be truly said that said crops have no commercial value simply because after the same have been sold and all expenses incident to their production and shipment deducted, there is no clear gain to the farmer, and therefore, as a corrolary, that the lands are not valuable for agricultural purposes."

We ask the Court to consider the reasoning of the Court in the celebrated Shreve case, 115 U. S. 392 where the meaning of "valuable mineral deposits" is construed:

> "The law will not distinguish between different kinds and classes of ore if they have <u>appreciable values</u> in the metal, nor is it necessary that the ore shall be of commercial value - economical value for treatment. It is enough if it is something ascertainable beyond mere trace which can certainly and positively be verified as existing in the ore." (underscore mine)

In U. S. vs Smith, 66 I.D. 172 (1959) a case involving lode mineral, an Interior solicitor held against the Forest Service in a case where a "valuable mineral discovery" was involved. The Solicitor held:

> "The mining laws do not require, as the Forest Service suggests, that the values shown must be such as will demonstrate that a claim can be worked at a profit or that it is more probable than not that a profitable mining operation can be brought about. The time honored test to be applied in determining whether a discovery has been made on a lode claim, is that set forth in Jefferson-Montana Copper Co., 41 L.D. 320, cited by the Forest Service as a correct statement of the elements necessary to achieve a valid discovery. Those elements are that there must be a vein or lode of quartz or other rock in place; that the quartz or other rock in place must carry gold and some other valuable mineral deposit; and that the preceding elements when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in an effort to develop a valuable mine."

On page 173 of the decision, the Solicitor point out that:

> "The assays produced by both parties show both high and low values. Certainly they show that the quartz carries valuable mineral deposits and they are proper evidence to be considered in arriving at conclusion as to whether a prudent man would be justifies in going ahead with the development of the claims."

That holding fits the case at bar - it is a case in point. Also note that in Muldrich v Brown, 37 Oregon, p. 185, the Court laid down the Oregon prudent man rule in the following language:

> "If the rock in place is sufficiency encouraging to warrant an ordinary prudent man in spending his time and money upon it, it is sufficient.
>
> Indeed, the fact that Muldrich and Whitman were willing to, and did, expend considerable sums of money on the Zero and Piedmont claims, is quite strong evidence of that fact."

The Oregon prudent man rule of discovery is consistent with that of both the Interior and Federal Court rulings. The trouble is that Interior officials have closed their eyes to the reasoning and conclusions of the early mining jurists and substituted their own theories as to what they want the rule to be. Very early in the mining law in Book v Justice Mining Co., 58 Fed. 106, the Court laid down the rule that

> "Where locaters have discovered rock in place bearing mineral in sufficient quantity to induce them to spend their time and money in prospecting and developing the ground located, whether or not the mineral assays high or low, then they have made a discovery within the meaning of the statute."

Mineral deposits do not change; the behavior of veins never change; the mining laws are the same now as in 1872. The learned Judge Hawly in Shoshone v. Rutter, 87 Fed. 807, following the reasoning of Book v Justice, supra, gives logical facts that always need to be remembered.

> "It must be borne in mind that the veins, and lodes are not always the same character. In

> some mining districts the veins, lodes and ore deposits..are so well defined as to avoid any question being raised. In other localities the veins, lodes and ore deposits are found in seams, narrow crevices, cracks or fissures in the earth, the precise extent and character of which cannot be fully ascertained until expensive explorations are made and the continuity of the ore and existence of the rock in place, bearing mineral, is established. It was never intended that the locator of a mining claim must determine all these facts before he would be entitled, under the law, to make a valid location. Every vein or lode is entitled to have barren spots and narrow places as well as rich chimneys and pay chutes, or large deposits of valuable ore. When the locator finds rock in place containing mineral, he has made a discovery within the meaning of the statute, whether the rock is rich or poor, whether it assays high or low. It is the finding of the mineral in rock in place, as distinguished from floart rock, that constitutes the discovery and warrants location."

We feel that the showing we have set forth under substantiality so opposes, contradicts, controverts, and is so unfavorable to defendant's decision, that it cannot possibly be said under the applicable law that the decision is supported by substantial evidence.

CONSTITUTIONAL QUESTIONS

THE GOVERNMENT'S INITIATED MINERAL CONTEST ADMINISTRATIVELY CONTRAVENES THE CONSTITUTION AND IS AN ABUSE AND ILLEGAL ASSERTION OF ADMINISTRATIVE POWER

SUMMARY OF ARGUMENT

The government's initiated mineral contest administratively is an invasion of legally protected rights; it violates the requirements of the Administrative Procedure Act; it usurps the province of the law making body and the functions of the Federal Courts; it causes confiscation and forfeiture of real property and improvements without due process of law; it is a denial of State's rights and denies vested rights and amounts to a type of Bill of Attainder, Pains and Penalties and Ex Post Facto, and operates illegally retroactively.

ARGUMENT

Undeniably, the defendant has performed the functions of the federal courts. He has used the administrative mineral contest proceeding to cancel, annul and cause divestiture of title and possession to real property (grants of mining locations) and gotten them back into federal control and ownership without any payment; he has, in fact, quieted title and removed the cloud of appellant's mineral lode locations; he has caused forfeiture of valuable improvements placed upon the claims used solely in connection with bona fide mining operations and development of minerals; he has deprived appellants and derived an "unjust enrichment" of the whole thereof including established discovery spots of valuable mineral deposits, dam and flooding sites, road and timber rights and established valuable minerals. These powers have been exercised traditionally only by the federal courts.

The Administrative Procedure Act was intended to reach the vice of infection of an adjudicatory body by the partisan views of those administering the law. TCS Motor Lines v U. S. 186 F. Supp. 777. The government acts as accuser, prosecutor, judge and jury of its own charges, by, in, and before its own agency while it is a litigant and stands to gain an advantage and unjust enrichment by its actions. It is an axion as old as the law itself that no man shall be judge of his own case. The Administrative Procedure Act never was intended to permit agencies to do what defendant has done. His department's duties are usually confined to making regulatory rules, enforcing them by investigation, adjudicating right, and imposing cease and desist orders. It has no right or power to dish out criminal penalties. By the same token it cannot adjudicate upon, or

take away real property and improvements.

Ordinarily a mortgagee or a vendor in land cases cannot take or sell the improvements placed upon the land except that there be a provision or agreement of the mortgagor or vendee so to do: Otherwise, they are required to pay reclamation or compensation for such improvements. We have found no federal law or Interior rule that provides, or that could legally provide, for such right and the taking is plain confiscation. A cross complaint to restrain taking, or a counterclaim for damages, cannot, under present contest procedure, be asserted.

Defendant has here and in innumerable other cases, applied his arbitrary placer marketability rule to lode claims requiring proof of present operation and present profitability as conditions precedent to location and/or patent of lode mining claims. He has done this in face of unsavory economic conditions low price paid for gold and government's restrictions against a citizen selling his newly processed gold anywhere in the world: He must sell only to the United States at its $35.00 per ounce, the price for gold established in 1934. It is a matter of common knowledge that a price much greater than $35.00 an ounce can be had elsewhere. This imposition tends to work forfeiture unconstitutionally. The United States should be estopped from such confiscatory procedure but a citizen cannot obtain such relief and therefore is deprived of a valuable right.

Appellants have been deprived from obtaining affirmative relief in the administrative contest proceeding as regards matters arising out of their application for mineral patents and/or germane to a government initiated mineral contest prosecuted administratively. That makes the contest proceeding

unconstitutionally lacking in due process.

Appellants aggrieved by the workings of government had to, prior to Oct. 5, 1962, go to the United States District Court for the District of Columbia to bring an action for judicial review of the defendant's mineral contest proceeding, There appellants were denied the right to appear by reason of the Court's Rule 4. Pruess was denied the right to appear as attorney: He was denied a copy of the transcript of testimony at the mineral hearing although he paid out $408.00 and received no copy: He was denied the right to have the case transferred to Oregon where the claims are located: This was for his convenience and to have an even chance with the defendant: He was denied notice of the trial date: He was denied a new trial: He was denied leave to appeal in forma pauperis: He has been kept a virtual prisoner, and still is a prisoner, in the federal district court at Washington, D. C. Appellant has been denied the opportunity to appear before the trial judge because of indigency, and from appearing before the Court of Appeals to present his case; to answer the Court's questions and to OPPOSE MISCONDUCT AND ERROR OF THE TRIAL JUDGE AND GOVERNMENT COUNSEL.

Congress wisely saw fit in enacting Title 30 USC Sec. 22, 29, to provide that the valuable mineral lands of the United States <u>are free and open to exploration and purchase under regulations prescribed by law and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the law of the United States</u>.

As stated earlier, early Oregon miners were instrumental, by reason of squatting and locating mineral lands and keeping the proceeds, in obtaining the tacit consent of the United

States to let them continue, and the miners' rules and regulations and customs were carried into, and are preserved by said basic mining statute, supra. Oregon passed its mining laws consistent with those of the United States. See Sec. 7818 (1920 Laws) and Sec. 53-201 (1930 Laws). See Gold Hill Quartz Co. v Ish, 5 Oregon, 103, for the Court's perusal of the early mining laws. In Kramer v Trickel, 200 Oregon, 645; 266 Pac. 2-709, the Court confirmed the right of the miners to make regulations for mining. In Sharkey v Candiani, 48 Oregon, 112; 85 Pac. 219, the Court further approved the rights of the State Legislature to make mining regulations. In Patterson v Tarbell, 26 Oregon, 32; 37 Pac. 76, held that said basic mining statute confers an offer of reward to the successful explorer to locate and possess the minerals. Oregon announced its prudent man rule of discovery in Muldrich v Brown, supra. These property laws and rules have become the law of conveyancing in Oregon. The Constitution of the United States guarantees State's rights. Interior and defendant have refused to give any credit to Oregon's prudent man rule of discovery, even though they have failed to first publish the intention to apply the placer marketability rule to lode claims or to prove the cost criteria applied. We claim grievous error and denial of constitutional rights in so doing.

Appellant invokes the constitutional guarantee against violation of the separation of powers doctrine in that, he claims defendant has usurped legislative powers in making the new law of discovery and in performing judicial functions of the Courts while only clothed with administrative power to administer the public lands.

Actually, appellants predecessors located and held said

lode mining claims prior to passage of gold regulations prohibiting sale of newly processed gold anywhere except to the United States at $35.00 per ounce, and of P. L. 208 (The Gold Mines Closure Act) and the enforcement of the arbitrary placer rule of marketability against our lode claims and the impositions imposed. In effect, defendant and Interior have imposed Ex Post Facto, Pains and Penalties and Bill of Attainder process, theory or doctrine against appellant which is forbidden by the United States Constitution: They have prejudiced appellants; They have prevented appellants from even proving conclusive profitability required of defendants. Appellants were unable to litigate such matters in the contest proceeding, or to obtain injunctive relief, or an estoppel against defendant.

Defendant unlawfully denies appellants' subsurface rights to exposed minerals /reserved to hold and develop, pursuant to P.L. 167 July 23, 1955. Defendant arbitrarily, unlawfully, requires appellant to make additional and other proof and meet new requirements contrary to, and inconsistent with the only requirement existing at the time the locations were made. This, in effect, works a forfeiture and confiscation and is a type of Ex Post Facto Laws as construed and applied. Insofar as the application of P.L. 167 is concerned, defendant's decision is vague and uncertain because it allows no saving or protective rights in face of admitted minerals.

Appellants are denied legally protective rights to continue development, do annual assessment work, and HOLD their mineral deposits and EXTRACT the values when economic conditions justify and a gold price rise, subsidy or comparable relief is granted and until the government removes its prohibition against sale of newly processed gold anywhere in the world where a price greater than $35.00 an ounce may be had: Moreover, defendant illegally

requires appellants to mine and extract minerals before adequate ore reserves are developed and economic conditions justify extraction. In this he mistakes the essence of prudency.

Errors in refusing to transfer the case to Oregon and denial of a fair and impartial trial, while claimed separately, follow from, and arise out of the government's initiated mineral contest administratively. They are part of the chain of events; they augment the claim that the administrative mineral contest is unconstitutional and therefore each point is presented as a part thereof.

REFUSAL TO TRANSFER

On October 5, 1962, while the action for judicial review herein was pending in the U. S. District Court for the District of Columbia, Congress changed the old venue law; it enacted P.L. 87-748. Now a citizen aggrieved by the workings of government can bring his action in the state where the mining claims are located. Congress condemned the tailormade process for convenience of government. The Court should read the reports of the Senate and House Committees. Appellant filed motions, before and after passage of the new law to transfer the case to Oregon, for his convenience and so as to have an even chance with defendant. Both motions were denied.

In its opinion on the first appeal, this Court held (a) that - "If appellant had originally filed his suit in Oregon and the suit had been pending in the District Court there at the time Section 1391-e was passed, the venue would have been proper; and (b) that as changed, the section applied to cases pending at the time of its passage; and (c) based upon a letter by the Deputy Attorney General to the Judiciary Committee

wherein he noted that the principal beneficiaries of the venue change would be "those who wish to seek review of decisions relating to public lands such as ...consideration of land patent applications ....S. Rep. No. 192, 87th Congress, 2nd session (1962), 2 U.S. Code Cong. and Ad. News 2784 (1962) Id. at 2789; and (d) "Hence, the District Court in Oregon should be regarded as a district where the action "might have been brought" for purposes of Sec. 1404-a. We note that appellant might have brought his suit in Oregon even a day or two after passage of the changed venue law." In construing defendant's citation, Hoffman v Blaski, 363 U.S. 335 (1960) this Court said - "The Court states that this plainly does not means 'where it may now be/brought with defendant's consent.' This Court ruled that Section 1391-e"is a remedial statute designed to facilitate suits brought by persons in the position of appellant herein." For these reasons shown it appears unnecessary that the trial judge should have considered whether or not the transfer would be "for the convenience of parties and witnesses in the interest of justice...." 28 USC 1404-a: Moreover, in an earlier order the District Court on a showing of indigency, ruled that appellant be excused from personal appearance at the trial and that submittal be by defendant's presentation to the trial judge, of the whole administrative record. In the interest of justice it surely would not be fair or proper to consider the matter of convenience of defendant or his attorney. No other or further order or procedure was requested or ordered: Furthermore, defendant stipulated for such presentment. Under the circumstances attendant, for the trial judge to find and make a determination as to whether or not the convenience of the parties and the interest of justice would be served by trans-

ferring the case to Oregon, was to inject gross discrimination and give the defendant an advantage that the appellant does not have. Summary judgment was denied to require the trial judge to judiciously review the whole record: He believed there were genuine issues of material facts that should be considered: That ruling in light of appellant's indigency rules out compelling plaintiff to appear at the trial in Washington for the convenience of defendant: Moreso, where submittal was to be by presentment to the trial judge of the whole administrative record. In the absence of appellant the ruling on convenience was improper. The appellant has been made a prisoner of the District Court in Washington against his will and has been denied an even chance with the defendant. THIS IS SHOWN BY WHAT ACTUALLY HAPPENED AT THE TWO TRIALS.

This Court in its opinion on the first appeal, by indicating to the trial judge that Section 1404-a would be furthered by permitting transfer in this case said - "Section 1391-e was intended to relieve plaintiffs of the burden of litigating far from their residences, to relieve the Courts in the District of Columbia of some of their case load, and to take advantage of the expertise district judges acquire in the problems peculiar to their areas." The transcripts of the two trials abundantly shows that the trial judge was not knowledgeable in mining matters and allowed himself by solicitation to be lulled into a sense of false expertise by defendant's counsel's onesided presentment. Had appellant been present he would have enlightened the Court on the proper mining law, or at least he could have opposed counsel's presentment. What has been overlooked is the fact that were the case transferred to Oregon, appellant could have personally presented his case to the federal court

which meets at Medford, Oregon, 30 miles distant from Grants Pass and he could have answered the Court's questions. Should there have been an appeal in the case, he could attend at San Francisco, California, just 500 miles distance from Grants Pass. What the trial judge actually did was to do what this Court in its earlier opinion indicated should not be allowed, e.g. to allow the matter of transferability to turn on "the wish or waiver of the defendant." Molloy v Bemis Bag Co., 130 F. Supp. 269 holds "Balance of convenience: There is a local interest in having localized controversies decided at home." See also Axe Houghton, Inc. v Atlantin Reserve, 227 F. Supp. 524. The trial judge denied appellant a legally protected right, and manifestly abused his discretion, in refusing to transfer the case to Oregon under the circumstances.

SUPERFICIAL TRIAL - - MOCKERY OF JUSTICE

Under the point "substantiality of the evidence to support defendant's decision" we cited the rule and authorities that it is the duty of the trial judge to review the entire administrative record./ and all opposing, contradictory evidence and admissions. The cannot consider or decide upon evidence or matters that de hors the administrative record. Henderson v Celebreeze, 239 F. Supp. 278. In the case at bar we find the trial judge soliciting information from defendant's counsel and permitting him to present evidentiary statements and then deciding the case on the basis thereof rather than upon a review of the whole administrative record. Please consider carefully the two transcripts of the two trials in the District Court. These evidentiary statements were not sworn to, nor was a foundation laid for presenting any such requested evidentiary statements: Moreover, appellant had no opportunity to object, cross examine or oppose such presentment.

At the second trial the trial judge wilfully and deliberately ignored this Court's direction that he should"take advantage of the expertise district judges acquire in the problems peculiar to their areas." Oregon judges are grounded in mining laws and mining problems. What happened at both trials is a sorry and pitiful example of a "comedy of errors"; it was mockery of justice. We are shocked at the display of what is supposed to be "equal justice under the Law". What happened at both trials gives much food for thought. On page 15 of the transcript of the first trial, it states:

> "THE COURT: "It is always unfortunate from the Court's standpoint when a litigant appears pro se."

What is meant by that? On page 3 of the transcript it shows that the trial judge, out of the blue, brought out that years ago he had been in the Department of Justice. Why that also? On page 17 that transcript shows that at the request of defendant's counsel, the trial judge ordered the clerk to turn over the administrative record to defendant's counsel with the statement - "we don't want to keep it here." This is the same trial judge whose findings and judgment was to the effect that he had considered or reviewed the whole administrative record. It is quite apparent that he did not do so. This was also the conclusion of the Court of Appeals: It ordered the trial judge to review the whole record.

It was this same trial judge who denied appellant's timely request for time to file his motion for a new trial. He also denied appellant's request for leave to appeal without prepayment of costs or give security therefor. On page 12 of the transcript of the second trial, this same trial judge, apparently ruffled by what the Court of Appeals said in its opinion,

said:

> "THE COURT: "There is something wrong in the Court of Appeals' opinion.....Apparently the writer of that opinion has'nt gone through the record. They refer to the fact that the trial judge denied an application to remove this case to Oregon. The Trial Judge never had the matter before him. I was the Trial Judge."

On page 13 the transcript shows:

> THE COURT: "Well, that is a little different. I don't like to be discourteous to the Court of Appeals but they certainly did'nt read the record."

That is unbecoming, to say the least, from one who himself did not read the whole administrative record and yet said he did by his findings and judgment.

We just can't believe that a federal judge would say at the second trial after ordered to review the whole administrative record he had not reviewed at the first trial, that in his opinion he would again say that he had considered or reviewed the whole administrative record. We have the date of the trial as January 3, 1966: The trial judge's opinion was made and filed on January 4, 1966. There are over 700 pages of transcribed testimony at the government's initiated mineral contest hearing. The application for patents consists of over 100 pages. There were about 100 assay reports of mineral values taken from many individual deposits upon the claims, not one of which was identified or mentioned in the opinion. There were documentary evidence consisting of reports, maps and plats and some ore samples. There were briefs consisting of many pages. There was a lengthy pretrial order wholly disregarded in essence. The transcript of the second trial makes crystal clear that dismissal of plaintiffs' complaint was based not upon the whole administrative record but upon the evidentiary statements of defendant's counsel and a onesided presentment.

The Court of Appeals in its opinion for remand did not, even if it could have, direct a trial de nova, nor order any new or further evidence de hors the record. What happened was inconsistent with its direction. The trial judge's opinion was not based upon a judicious consideration of the whole administrative record but rather it appears it was based upon what defendant's counsel presented to him. BECAUSE THE TRIAL JUDGE SAID HE REVIEWED THE WHOLE ADMINISTRATIVE RECORD, NOW ATTACKED, MAKES IT THE DUTY OF THIS COURT TO REVIEW THE WHOLE ADMINISTRATIVE RECORD AND DECIDE THE QUESTIONS PRESENTED ON THIS APPEAL.

Defendant's counsel even got across to the trial judge who relied thereon, that the placer rule of marketability in Foster v Seaton, supra, controlled the lode claim case at bar: Yet, the decision doing away with that rule was announced in Denison v Udall, supra, on December 13, 1965. Did they not know about that when the decision was made on January 4, 1966? All the time defendant's counsel well knew that the Court's Pretrial Order included appellant's contention that the rule of marketability intended to be applied to lode claims, and which was so applied to the case at bar, had never first been duly published as required and yet he did not state that contention to the trial judge. Why not? Why did'nt the trial judge note that contention as disclosed by the record: Why did he ignore that contention?

This same trial judge denied appellant's timely motion for a new trial and also his motion for leave to appeal again without prepayment of costs or give security therefor. We feel justified in making the charge that appellants did not have a fair and impartial trial and that the trial judge is guilty of dereliction of duty and counsel for defendant guilty of mis-

conduct in both trials thereby depriving appellants of "day in court" and that the trials were a ghastly farce - justice has been rationed. Deffe v General Motors, 131 F. 2d, 379; Fetz c Central Nebraska Public Power, 124 F. 2d, 578; Southern Pacific Co. v Guthrie, 186 F. 2d, 926 (13); Lechid v Rinaldi, 246 F. Supp. 676; Galavan v Press, 347 U.S. 424; 98 L. ed, 911; 14th amendment to the Constitution of the United States.

CONCLUSION

Appellants feel they have been hindred and delayed and are the victims of a gross miscarriage of justice based upon arbitrary, capricious and whimsical action of defendant. They have had their mineral lands, minerals, improvements, timber and road rights taken away from them and put back into federal ownership and control without payment and without due process of law. They bitterly complain of defendant making a FRANKENSTEIN of the law of discovery. He has torpedoed the intent of Congress to encourage development of the mineral resources of this great nation. We feel justified in requesting that this Court reverse, set aside defendant's decision and mandate the issuance of patents. Failing in that appellants respectfully request the Court to transfer the case to Oregon for disposition.

> Courts should interfere with agency determinations when upon the whole record the proceedings are manifestly unfair, or substantial evidence to support the administrative decision, is lacking, or error of law has been committed, or the record manifests an abuse of discretion. 150 F. Supp. 293. Agencies must be held to the same standards as is required of courts of law. Williams v U.S., 241 F. Supp. 538.

This Court may adjust its relief to the exigencies of the case in accordance with equitable principles governing judicial

action. Ford Motor Co. v N.L.R.B. 305 U.S. 364; 83 L. ed, 221. We remind the Court of the rule in N. E. Niehof v F.T.C., 241 F. 2d, 42 (5-8):

> "The power of the Court of Appeals, to enforce, set aside or modify an administrative order, is an exercise of original jurisdiction, and that the Court may by its own orders protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do in an injunction suit."

Respectfully submitted,
C. F. Pruess, Sr.

C.F.Pruess, Sr., Pro Se
1010 NW A Street
Grants Pass, Oregon
Proper Person Plaintiff
and Appellant in forma pauperis

I certify that the above and foregoing is a true copy of the original, and of the whole thereof. C. F. Pruess Sr.

STATE OF OREGON)
: ss
County of Josephine)

I, C. F. Pruess, Sr., being first duly sworn, depose and say that I am appellant pro se in forma pauperis in the within entitled cause; that I served a copy of plaintiff's brief upon Herbert Pittle, Attorney of record for defendant by enclosing the same in a sealed envelope bearing my return address thereon, with postage fully prepaid and addressed to said Herbert Pittle, Attorney at Law, c/o Justice Department, Washington, D. C. and depositing the same in the United States Post Office at Grants Pass, Oregon on the 27th day of April, 1966.

C. F. Pruess, Sr.
Appellant pro se

Subscribed and sworn to before me this 26th day of April, 1966.

Ellen Pruess
Notary Public for Oregon
My commission expires
March 4, 1967

(SEAL)

APPENDIX - A

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Washington, 25, D.C.

M-36642

Memorandum

To: Assistant Secretary, Public Land Management.

From: Solicitor

Subject: Review of the "marketability rule" as applied to the law of discovery.

Your memorandum to the Secretary requesting a review of this rule has been referred to this office for reply.

After giving careful consideration to this subject, it is our conclusion that there is no basis for making any change in the test which the Department applies to mining claims in determining whether there has been a valid discovery. However, we believe that, since our decisions may have been misunderstood and an undue rigidity may have been ascribed to them, we should explain the position taken.

The test which we apply, the prudent man test, is based upon the provision in R. S. 2319 (30 U.S.C., sec.22) that only "valuable mineral deposits" may be located. A valuable mineral deposit, it has been said, is one the discovery of which would justify a man of ordinary prudence in the further expenditure of time and money with a reasonable prospect of success in the effort to develop a paying mine. Castle v Womble, 19 L.D. 455 (1894): Christman v. Miller, 197 U.S. 313 (1905)

The marketability rule about which you have particularly asked our views is merely one aspect of this test. The Department and the courts have, we believe, rightly held that a prudent man would not be justified in developing a mineral deposit if the extracted minerals were not marketable. This marketability test is in reality applied to all minerals, although it is often mistakenly said to be applied solely to nonmetallic minerals of wide occurrance. Many minerals are deemed intrinsically valuable.

An intrinsically valuable mineral by its very nature is deemed marketable, and therefore merely showing the nature of the mineral usually meets the test of marketability. On the other hand, where we are concerned with a nonmetallic mineral found in a great many places, application of the prudent man test requires that a market for the mineral be shown by the locator. The extreme example is probably sand and gravel, but in many cases the available deposits far exceed the market. In such cases we must insist that the locator show that there is a market actually existing for his mineral. To validate sand and gravel claim proof of present marketability must be clearly shown.

Other cases fall between the two extremes of the intrinsically valuable mineral on the one hand and sand and gravel on the other hand. Each case must be judged on its own merits. When a nonmetallic mineral is not of extremely wide occurrance, and when a general demand for that mineral exists, it may be enough, instead of showing an actually existing market for the product of that particular mine, to show that a general market for the substance exists of a type which a reasonably prudent man would be justified in regarding as one in which he could dispose of those products.

There are two points which we wish to stress. The first is that the marketability test is only one aspect of the prudent man test, albiet a very important aspect since in the absence of marketability no prudent man would seem justified in the expenditure of time and money. The second is that each case must be judged on its own facts. Too rigid application of rules mistakenly interpreted from departmental decisions could lead to incorrect decisions in the field.

(Signed) Frank J. Barry
Solicitor

BRIEF FOR STEWART L. UDALL,
SECRETARY OF THE INTERIOR, APPELLEE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,095

C. F. PRUESS, SR., EXECUTOR, ET AL.,

APPELLANTS

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR,

APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDWIN L. WEISL, JR., ~~Esq.~~ NC
Assistant Attorney General.

ROGER P. MARQUIS, OA
HERBERT PITTLE, OA
GEORGE R. HYDE, OA
Attorneys, Department of Justice,
Washington, D. C., 20530.

QUESTION PRESENTED

Whether the district court erred in finding that there was substantial evidence to support the conclusion of the Secretary of the Interior that the appellants' mining claims were null and void.

I N D E X

CITATIONS

*Cases chiefly relied upon are marked by asterisks.

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UNITED STATES COURT OF APPEALS

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLEE

PREVIOUS OPINIONS

The district court did not write an opinion. Its judgment, dismissing the complaint and findings of fact and conclusions of law, is contained in the Appendix to this brief, pp. 49 - 53 . The administrative decisions of the Hearing Examiner, the Acting Director of the Bureau of Land Management and a Deputy Solicitor of the Department are set out in the Appendix hereto, pp. 26-48. An opinion of this Court on an earlier appeal, dated November 19, 1965, is not yet reported.

JURISDICTION

The jurisdiction of the district court was asserted under 5 U.S.C. sec. 1009. Judgment of dismissal was entered on January 18, 1966. Notice of appeal, in the form of a motion to appeal without prepayment of costs, was filed in the district court on February 1, 1966. Jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

STATEMENT

This action seeks the reversal of the district court's judgment, which was entered after proceedings had been held pursuant to the decision of this Court in C. F. Pruess v. Udall (C.A. D.C. No. 18,907, Nov. 19, 1965) unreported. The district court has again held that a determination by the Department of the Interior, that minerals had not been found within the limits of the appellants' mining claims in sufficient quantities to constitute a valid discovery, was based upon substantial evidence and was conclusive.

The appellants, on March 25, 1957, filed an application for patent, Oregon 05396, to seven lode mining claims for gold and other minerals located near Grants Pass, Oregon.

The mining claims are known as the Ida Group and consisted of the Black Jack, Buckskin, Wild Rose, Oregon, Big Mac, Little Mac and Big Rock. By notice dated February 12, 1958, which was promulgated under the authority of the mining laws, 30 U.S.C. sec. 22 et seq. and 43 C.F.R., Part 221, the United States contested the validity of these claims. The complaint filed by the United States instituting the contest asserted, among other things, that minerals had not been found within the limits of the claims in sufficient quantities to constitute a valid discovery. The appellants denied the assertions and a hearing was held before a Hearing Examiner of the Bureau of Land Management, Department of the Interior, at Grants Pass, Oregon, on October 1, 2, 20 and 21, 1959. During this hearing, numerous witnesses, including mining experts, testified on behalf of the United States and the appellants. In addition, many exhibits were admitted into evidence, including approximately 100 assay reports.

On the basis of the testimony given at the hearing, which is contained in some 700 odd pages of transcript together with exhibits, the Hearing Examiner issued a decision

dated January 12, 1960 (App. 26). In this decision, the Hearing Examiner held that the lands upon which the mining claims were located were mineral in character but that "* * * there has not been a discovery of a valuable mineral deposit within the mining laws as interpreted by the Department on any of the claims remaining in issue," and declared the claims remaining in issue to be null and void (App. 30).

An appeal was then taken from the Hearing Examiner's decision to the Director of the Bureau of Land Management who, after a review of the record compiled at the hearing, issued a decision dated August 2, 1960, affirming the Hearing Examiner's decision (App. 33). This decision concluded that "While the evidence would justify a prudent man in further prospecting and exploring these claims, it falls far short of demonstrating the probability of an existing vein possessing in and of itself a present or prospective value for mining purposes, i.e., a vein (or series of veins) that can be exploited at a profit" (App. 40). This decision was appealed to the Secretary of the Interior who, by decision dated August 22, 1961, No. A-28641, after having reviewed the record, stated (App. 48):

> A review of the entire record in this case indicates that even though enough minerals have been found to warrant further exploration of these claims, there has been no discovery of actual mineral values necessary to validate a mining location.

The appellants thereafter petitioned for reconsideration and reopening of this contest, which was denied. They then petitioned for modification of the decision on reconsideration and, finally, a supplemental petition for reconsideration, all of which were denied.

On April 25, 1962, the complaint in this action was filed in the United States District Court for the District of Columbia, seeking judicial review of the agency action. A series of motions was thereafter filed concerning the appellants' lack of compliance with Rule 4 of the United States District Court for the District of Columbia. On May 22, 1962, an order was entered denying the appellants' motion to excuse compliance with Rule 4. The appellants then filed a motion to transfer this action to the United States District Court for the District of Oregon. The district court, by order dated June 6, 1962, denied this request.

A motion for judgment by default was then filed by the appellants, together with a request for reconsideration of their motion to excuse compliance with Rule 4. By order dated July 13, 1962, cross-motions to strike the complaint and for a default judgment were denied. On July 16, 1962, an order denying the appellants' motion for reconsideration of their previous motion with respect to Rule 4 was entered by which the appellants were advised that they had the right to appear in proper person. By order dated October 5, 1962, the district court denied the appellants' motion to require transmittal to them of the original record in this case. Previously, by letter dated August 6, 1962, the appellee had offered to make available to the appellants the entire administrative record for their inspection and copying without requiring an order of the court. (See defendant's objections to motion of plaintiff filed September 10, 1962.) Thereafter, the appellants filed a motion for an order in forma pauperis requesting that the appellee furnish the appellants with a copy of the transcript of the testimony of the mineral contest proceeding. In addition, appellants again filed a motion to transfer the case, this time

under 28 U.S.C. sec. 1361, to the District Court for the District of Oregon. Both motions were denied by order dated March 18, 1963. Appellants filed a request for reconsideration of the order of March 18, 1963, which was denied by order entered April 24, 1963.

Appellants and appellee both filed motions for summary judgment and oppositions, together with memoranda containing points and authorities, as well as affidavits in support of their motions. In essence, the appellants alleged that the administrative decisions were null and void because they were arbitrary and capricious, contrary to the evidence, and not in accord with law. Numerous assertions were made to support these conclusions which, because of their length, have not been summarized here. The appellee denied that the administrative opinions were arbitrary or capricious or contrary to law and stated that they were based upon substantial evidence. Both motions for summary judgments were denied by order entered August 22, 1963.[1/]

1/ Although no appeal could be taken from an interlocutory order, we note that, since review proceedings such as these rest on the administrative record, they are appropriate for disposal on summary judgment and that is the normal practice. See Asenap v. Huff, 114 U.S.App.D.C. 118, 312 F.2d 358 (1962).

Pretrial statements were then filed by both parties. The appellee's proposed statement, filed November 21, 1963, recited the events leading up to that proceeding and described the basis of the administrative decisions and the conclusions arrived at. The issue of law as seen by the appellee was "whether the Secretary's determination of the validity of the mining claims is conclusive when supported by substantial evidence."

A pretrial order was entered December 5, 1963. The facts supporting appellants' claim were therein detailed, as were the facts which supported the appellee's position. It was also stipulated that the appellee would offer in evidence the entire administrative record at the trial. Objections to the pretrial order were filed by the appellants and subsequently denied by order dated December 20, 1963.

Appellants filed a "notice-requests" asking to be excused from personal appearance and oral argument. Also requested was leave to make proof by deposition of any matter allowed. In the alternative, it was again requested that the case be sent to the United States District Court for the District

of Oregon. Appellee opposed the motion only in that it sought to transfer the case and sought to make proof by deposition. On February 6, 1964, the appellants' motion to submit was granted and the alternative transfer of the case denied. This order was entered February 25, 1964.

A trial brief was prepared by the appellants and filed with the court. Subsequently a proposed judgment, findings of fact and conclusions of law were filed. A hearing was had on May 6, 1964, at which time the court held for the appellee. Subsequently, by order dated May 12, 1964, the court entered judgment in favor of the appellee and dismissed the complaint. The court also filed extensive findings of fact and conclusions of law.

On the basis of briefs submitted by both parties, this Court issued an opinion (C. F. Pruess v. Udall, No. 18,907, Nov. 19, 1965, unreported), one judge dissenting. This Court remanded this case to the district court for further proceedings consistent with its opinion.

The opinion of this Court in pertinent part recognized that "the courts have a very limited function in reviewing the determinations of the Secretary of the Interior. Foster v. Seaton, 106 U.S.App.D.C. 253, 271 F.2d 836 (1959); Morgan v. Udall, 113 U.S.App.D.C. 192, 306 F.2d 799, cert. den., 371 U.S. 941 (1962). In the Morgan case we stated that 'the determination by the Secretary of a question of fact on a matter within his jurisdiction is well-nigh conclusive.' Supra at 194, 306 F.2d at 801 (footnote omitted). But the District Court still has an obligation to determine whether the Secretary's decision is supported by substantial evidence." This Court went on to conclude, on the record before it, that the district judge's conclusion of law that the Secretary's decision was based on substantial evidence was not based upon a review of the administrative record and could not be sustained. For this reason the case was remanded to the district court. This Court, in addition, recognized that the only proper venue at the time this action was filed was the District Court in the District of Columbia. This venue situation was subsequently changed by the addition on October 5, 1962, of a subsection to

28 U.S.C. sec. 1391. This Court went on to state that the trial court did not give reasons for the denial of the appellants' motions to transfer this case to the District Court in Oregon.[2/] This Court found that "* * * there is no suggestion on the record that the court exercised its discretion and concluded that transfer would not be 'for the convenience of parties and witnesses, [and] in the interest of justice * * *' 28 U.S.C. Sec. 1404(a). We think that the trial judge should consider this matter further in the light of the following principles: * * *."

This Court concluded that "If the trial judge finds that the convenience of the parties and the interest of justice would be served by transferring the case to Oregon, the policies of Section 1391(e) and Section 1404(a) would be furthered by permitting transfer in this case."

On December 15, 1965, the appellants filed a motion to transfer this case to the United States District Court for the District of Oregon. Opposition to this motion to transfer

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2/ In matter of fact, the trial judge in this case had not ruled on the motions to transfer. These motions to transfer were handled by a motions judge prior to the trial judge entering the case and were not considered by the trial court.

was filed by the appellee on December 27, 1965. On January 3, 1966, a hearing was held pursuant to the opinion of this Court and on the motion for transfer. At the hearing the appellants again were not represented in court by counsel. At the conclusion of the hearing, the court took the case under advisement. On January 4, 1966, the district judge filed a memorandum denying the appellants' motion for transfer, sustaining the decision of the Secretary of the Interior, and dismissing the complaint on the merits. On January 17, 1966, the appellants filed a motion to set aside the judgment and for a new trial. On January 18, 1966, the district judge entered an order denying the motion for transfer, sustaining the Secretary of the Interior's decision and dismissing the complaint on the merits.

On February 1, 1966, the appellants filed in the district court a motion to appeal without prepayment of costs. This motion was denied by the district judge on February 2, 1966. On February 23, the appellants filed an application to appeal without prepayment of fees and costs in the Court of Appeals for the District of Columbia Circuit, Misc. No. 2730. By order filed March 31, 1966, this Court granted the appellants' petition.

SUMMARY OF ARGUMENT

I

Judgment was properly entered for the Secretary of the Interior. The Secretary's factual determination that there was no valid discovery within the meaning of the mining laws is supported by evidence and is conclusive in the absence of fraud or imposition.

II

The trial judge's finding that the interests of justice would not be served by transferring this case to another district court is supported by the record and fully justified by the facts of this case. This is a case which is limited to matters already in the record, and no reason exists to involve a new district judge and court of appeals.

III

The arguments raised by the appellants are directed toward years of settled administrative practice and are either invalid or irrelevant. If accepted, they would compel the Department of the Interior to change very substantially procedures followed for generations with congressional and Supreme Court approval.

ARGUMENT

I

THE DISTRICT COURT PROPERLY ENTERED JUDGMENT FOR THE SECRETARY OF THE INTERIOR

On its face, the complaint filed in this case simply attacks a finding of fact made by the Secretary of the Interior. The Secretary, in affirming the decisions of the Director of the Bureau of Land Management and a Hearing Examiner, found that the appellants had not made a valid discovery within the limits of the subject mining claims. From this finding it follows, as a matter of law, that the alleged mining claims were invalid. As the Supreme Court stated in Cameron v. United States, 252 U.S. 450, 464 (1920):

> Whether the tract covered by Cameron's location was mineral and whether there had been the requisite discovery were questions of fact, the decision of which by the Secretary of the Interior was conclusive in the absence of fraud or imposition, and none was claimed. [Citations omitted.]

The plenary authority of the Secretary of the Interior with respect to management and disposition of the public domain has been recently reaffirmed by the Supreme Court in Boesche v. Udall, 373 U.S. 472, 476-477 (1963), and Best v. Humboldt Mining Co., 371 U.S. 334 (1963), wherein the Court stated (at p. 338):

> "Due process in such case implies notice and a hearing. But this does not require that the hearing must be in the courts, or forbid an inquiry and determination in the Land Department." Orchard v. Alexander, 157 U.S. 372, 383. If a patent has not issued, controversies over the claims "should be solved by appeal to the land department and not to the courts." Brown v. Hitchcock, 173 U.S. 473, 477. And see Northern Pacific R. Co. v. McComas, 250 U.S. 387, 392.

The Supreme Court has made clear in Cameron and Humboldt, supra, that the finding of fact by the Secretary that there was no valid discovery is virtually conclusive and the review will be limited to ascertainment of whether the claimant has been accorded due process by notice and a hearing. Clearly, there has been notice and a hearing and appellants have not alleged fraud or any facts from which fraud could be inferred.

The scope of judicial review in actions such as this has always been confined to the administrative record. This was recognized by this Court in Morgan v. Udall, 113 U.S.App.D.C. 192, 194, 306 F.2d 799, 801 (1962), cert. den., 371 U.S. 941, where it said:

> It has long been established that the determination by the Secretary of a question of fact on a matter within his jurisdiction is well-nigh conclusive. Here the District Court with the administrative record before

> it, entered findings of fact and conclusions of law supporting the Secretary's decision. In light of the record, we have considered the claims advanced by the appellants and have discerned no adequate basis upon which that determination may be disturbed.

The record in this case clearly shows that the district judge has complied with this Court's remand and reviewed the administrative record. The district judge in his order (App. 53) outlines his compliance with this Court's mandate. He states that he has "considered the briefs previously filed by the plaintiffs and defendant, having heard argument by counsel for the defendant, having examined and considered the administrative record, * * *." [Emphasis supplied.] An examination of the district judge's memorandum (App. 49) also clearly shows that the district judge has reviewed the administrative record involved in this case. The reference to pages in the transcript of the administrative hearing also supports the district judge's statement that he has reviewed the administrative agency's record. The district judge, after reviewing the evidence introduced at the administrative hearing, stated (App. 50):

> Thus there was a clear-cut issue of fact which the Department of the Interior decided against the plaintiff. There was substantial evidence in the record as a whole to support these adverse findings and, therefore, the Court may

> not set them aside. The plaintiffs' memorandum submitted in this Court is merely a plea to the effect that his testimony should have been accepted in preference to that of the Government experts.

This is clearly the correct result, as a review of the decisions of the Hearing Examiner, the Director of the Bureau of Land Management and the Secretary of the Interior will show. These decisions are based upon a thorough review of the record made before the Hearing Examiner and show that they are based on a consideration of the conflicting testimony. It is readily apparent that they are supported by substantial evidence.

In the opinion of this Court remanding the case to the district court, the limited function of the courts of appeals in reviewing determinations of the Secretary of the Interior is recognized. In Foster v. Seaton, 106 U.S.App.D.C. 253, 255-256, 271 F.2d 836, 838-839 (1959), this Court held:

> Thus the case really comes down to a question whether the Secretary's finding was supported by substantial evidence on the record as a whole. We think it was. There may have been substantial evidence the other way also, but we do not weigh the evidence.

See also Asenap v. Huff, 114 U.S.App.D.C. 118, 119, 312 F.2d 358, 359 (1962); Morgan v. Udall, 113 U.S.App.D.C. 192, 194, 306 F.2d 799, 801 (1962), cert. den., 371 U.S. 941; Safarik v. Udall, 113 U.S.App.D.C. 68, 74, 304 F.2d 944, 950 (1962), cert. den., 371 U.S. 901.

In short, as in so many of these cases, appellants' real complaint is that their evidence was not accepted, rather than the absence of any evidence to support the result.

II

THE COURT CORRECTLY REFUSED TO TRANSFER THIS CASE TO THE DISTRICT COURT IN OREGON

At the time this suit was instituted, the only court that had jurisdiction over the parties was the United States District Court for the District of Columbia. After this suit was filed, Congress passed the Act of October 5, 1962, 76 Stat. 744, 28 U.S.C. sec. 1361, giving the district courts throughout the United States generally broader venue in suits brought against government officials.

This Court, in its opinion remanding this case, stated:

> * * * The trial court did not give reasons for the denial of appellants' motions [to transfer]. However, there is no suggestion on the record that the court exercised its discretion and concluded that transfer would not be "for the convenience of parties and witnesses, [and] in the interest of justice . . . ." 28 U.S.C. § 1404(a). [Footnote omitted.] We think that the trial judge should consider this matter further in the light of the following principles:
>
> * * * * *
>
> If the trial judge finds that the convenience of the parties and the interest of justice would be served by transferring the case to Oregon, the policies of Section 1391(e) and Section 1404(a) would be furthered by permitting transfer in this case. * * *

The district judge, in his memorandum filed January 4, 1966 (App. 51), stated:

> The motion for a transfer has now been renewed and has been carefully considered by this Court. The Court is of the opinion that the interests of justice would not be served by transferring the case to Oregon at this juncture. The only question involved in this action is to be determined on the basis of the administrative record. The plaintiff has been able to present his views in writing, which have been carefully considered. No reason is discernible for transferring this case at this time and placing a burden on still another District Judge and on another Court of Appeals. The situation might well be different if the action were one in which testimony were to be taken. * * *

The decision as to whether to transfer this case to the district court in Oregon was recognized by this Court as lying within the discretion of the trial judge. The trial judge was instructed to decide the question based upon certain principles outlined in this Court's opinion. The trial judge's decision to not transfer this case to another district court is based on sound considered reasoning. The trial judge correctly found that the question involved was to be determined solely on the basis of an administrative record. There, in fact, was no reason to bring this matter before another district judge and court of appeals. The convenience of appellants is the only possible reason for transferring this case to Oregon. Since the trial judge has stated that the views of

the appellants have been presented in writing and have been carefully considered, there was no compelling reason to transfer this case to another district court. Thus, the convenience of counsel is not a controlling factor in determining whether a case should be transferred under Section 1404(a). Sypert v. Miner, 266 F.2d 196, 199 (C.A. 7, 1959).

The record is quite clear that appellants' desire to transfer the case to the United States District Court for the District of Oregon was motivated by an attempt to persuade that court to depart from the administrative record contrary to the established law in the field. Since the courts of the District of Columbia have had more cases of this type than any other courts in the country due to the prior venue limitation, they are uniquely experienced in handling this type of case. Certainly the attempt to depart from the established law is no ground for transfer of the case.

III

APPELLANTS' ARGUMENTS PRESENT NO GROUNDS WHICH WOULD WARRANT REVERSAL OF THE COURT'S JUDGMENT

Interspersed with assertions about the evidence (which fail to show lack of substantial evidence to support the decision) appellants make many assertions which controvert years of settled practice in these cases, are otherwise invalid, or are irrelevant.

The Supreme Court, in Best v. Humboldt Mining Co., 371 U.S. 334, 339 (1963), said:

> Congress has entrusted the Department of the Interior with the management of the public domain and prescribed the process by which claims against the public domain may be perfected. [Footnote omitted.] The United States, which holds legal title to the lands, plainly can prescribe the procedure which any claimant must follow to acquire rights in the public sector.

The arguments raised by the appellants are not novel. We therefore comment only briefly on them.

A. The appellants' contentions were before the district court. - The record demonstrates, we submit, that appellants have received the review to which they were entitled. It must be remembered that they are claiming rights to public property to which they are entitled only to the extent that Congress has so provided. It has not provided greater bounty to those who may appear in propria persona, in forma pauperis or by briefs, rather than personal appearance. Appellants have no special rights to public property because of such circumstances.

B. The Oregon law of discovery has no application in this case. - Federal law governs as to whether a discovery has been made. Best v. Humboldt Mining Co., 371 U.S. 334, 339 (1963). The federal rule of discovery has been stated time and

time again by the Secretary of the Interior and the Supreme Court to be that the discovery must be of such a character that "a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." Castle v. Womble, 19 L.D. 455, 457; Chrisman v. Miller, 197 U.S. 313, 322 (1905); Cameron v. United States, 252 U.S. 450, 459 (1920); Mulkern v. Hammitt, 326 F.2d 896, 897 (C.A. 9, 1964). The Oregon law of discovery has no application in this case.

C. The issuance of a patent for a part of the group of mining claims does not satisfy the discovery requirement of the mining laws. - It is expressly provided by Title 30 U.S.C. sec. 23 that "* * * no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." The existence of a valid discovery on an adjacent mining property or the issuance of a patent based on a discovery on land adjacent consequently is irrelevant and does not satisfy the explicit requirement of the mining laws.

D. The requirement of present market value is not a change in the mining laws or a change in regulation requiring publication in the Federal Register. - This question has been ruled on by this Court in Foster v. Seaton, 106 U.S.App. D.C. 253, 255, 271 F.2d 836, 838 (1959), where it was stated:

"Thus, such a 'mineral locator or applicant, to justify his possession, must show * * *, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit.'" This decision was followed in Adams v. United States, 318 F.2d 861 (C.A. 9, 1963), and Henrikson v. Udall, 350 F.2d 949 (C.A. 9, 1965).

E. The Government's control of the sale of gold does not prohibit it from applying the established rule of discovery. - It was stated in Castle v. Womble, 19 L.D. 455, 457 (1894), that "the requirement relating to discovery refers to present facts,and not to the probabilities of the future" and that "where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met * * *."

The Ninth Circuit, in Adams v. United States, 318 F.2d 861 (1963), recently denied a patent and cancelled an alleged mining claim because it was not presently valuable for minerals. In Adams, it was economic conditions that had changed, invalidating the discovery. Appellants herein can have no more a vested interest in a standard for ascertaining whether a

valid discovery has been made than they have in the economic conditions which fostered the standard. An analogous case is found in United States v. Commodities Trading Corp., 339 U.S. 121 (1950), where the Government fixed the price of a commodity and then requisitioned it at the controlled price. The reason why mining is uneconomic does not change that fact nor justify use of the mining laws to obtain a fee patent or to use the public land for nonmining purposes.

F. The procedure followed by the Department of the Interior complies with the provisions of the Administrative Procedure Act. - Appellants argue that the proceeding before the administrative agency was inadequate and that the administrative agency acted as accuser, prosecutor, judge and jury. The attack made on the administrative procedure followed by the Department of the Interior is an attack on the Administrative Procedure Act itself, which clearly provides for the procedure which was followed in this case. 5 U.S.C. secs. 1001-1009.

The requirement that appellants share in the costs of the hearing before the examiner also is proper and was contained in the then current regulations, 43 C.F.R. sec. 221.17, which are now found in 43 C.F.R. sec. 1851.6. The appellants were advised that, if they were unable to pay their share of

the reporting fees, they could have been relieved under the provisions of 43 C.F.R. sec. 221.75(3). These regulations also provided that "Each party must pay for any copies of the transcript obtained by him * * *." 43 C.F.R. sec. 221.75(c). The appellants were not denied a copy of the record of the administrative hearing. They did not pay for a copy of the transcript, as alleged in their brief (pp. 25, 35).

Here again it must be remembered that appellants are seeking to secure federal property as to which they have no vested right but only the expectation of securing it by following the statutory and administrative procedure.

CONCLUSION

There is substantial evidence supporting the decision of the Secretary of the Interior. The district court's judgment is fully in accord with the evidence and should be affirmed.

Respectfully submitted,

EDWIN L. WEISL, JR.,
Assistant Attorney General.

ROGER P. MARQUIS,
HERBERT PITTLE,
GEORGE R. HYDE,
Attorneys, Department of Justice,
Washington, D. C., 20530.

MAY 1966

APPENDIX

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Office of the Hearing Examiner

P. O. Box 3861
Portland 8, Oregon

Contest No. 0-213

January 12, 1960.

DECISION

Involving Buckskin, Wild Rose, Black Jack, Oregon, Big Mac, Little Mac and Big Rock Lode Mining Claims in Secs. 25 and 26, T. 35 S., R. 5 W., W.M., Oregon. Application No. 05396.

UNITED STATES OF AMERICA, CONTESTANT

v.

C. F. PRUESS, SR., ET AL, CONTESTEES

Protest against Black Jack Dismissed; Buckskin, Wild Rose, Oregon, Big Mac, Little Mac, and Big Rock declared Null and Void.

The Contestant initiated an invalidation proceeding against the mining claims involved in patent application No. 05396 and the claimants thereof by the filing of a complaint in the Oregon Land Office on February 12, 1958. The complaint alleged as to each of the claims as follows:

(a) The land embraced within the claim is nonmineral in character;
(b) Minerals have not been found within the limits of the claim in sufficient quantities to constitute a valid discovery.

A hearing was held in Grants Pass, Oregon beginning on October 1, 1959, at which the parties were allowed to present evidence and to examine and cross-examine witnesses. At the hearing the Contestant was represented by L. K. Luoma, Office of the Regional Solicitor, United States Department of the Interior, Portland, Oregon, and the Contestees were represented by C. F. Pruess, Sr., Attorney at Law, Grants Pass, Oregon.

At the hearing the Contestant moved to have the complaint against the Black Jack Claim dismissed on the grounds that an examination made after the complaint was filed had verified the existance of a valuable mineral deposit on the claim. This motion was granted. Accordingly, the complaint against the Black Jack Claim is dismissed.

The group claims were located primarily for gold and silver with copper, nickel, molybdenum, and gallium of secondary interest and potential by-products. The claims were referred to as the Ida Group and are situated 8 miles northeast of Grants Pass on the Granite Hill road on rough, steep terrain within the Louse Creek drainage. The underlying substrata consist of greenstone and serpentine with contacts between the two within the group of claims. The timber on the group was estimated to be valued at $88,394.30.

The factual evidence regarding the nature of the mineralization on the claims submitted on behalf of both parties was extensive but appeared to be similar. This evidence was to the effect that a quartz vein was exposed in the Big Mac tunnel, that this vein had a maximum width of 18 inches and tapered down to nothing within the tunnel, and that a quartz vein had been exposed in the Big Mac discovery cut which had a strike toward the tunnel on the Little Mac and toward exposures on the Wild Rose. The improvements on the Little Mac consisted of the discovery cut, a tunnel and several pits. Mineralization was exposed within the improvements and verified by the samples secured by the witnesses. The vein structure in the "Mother Lode" area of the Wild Rose (Exh. A) was approximately 6 feet in width, but the mineralized portion of the vein was limited. Vein structures were also found on the Buckskin Claim in and near the discovery cut, on the east end of the Wild

Rose, and smaller veins were exposed on the Big Rock and Oregon Claims.

Numerous samples were taken and assayed by the parties at locations shown on Exhibits A, 1 and 8. Selected samples taken from small lenses or pods within the vein structures had indicated assay values up to $85.98 a ton (Sample 21, Exh. W from the discovery cut on the Wild Rose). Other samples taken across the width of the vein structures a short distance away, often revealed values of little or nothing. The mineralization on the group of claims was described by a Government witness as being short, nonpersistent stringers of quartz that would pinch and swell and disappear and then come back again.

The documentary evidence presented at the hearing included the Oregon Metal Mines Handbook published by the Department of Geology and Mineral Industries in 1952. The article on page 79 of this bulletin relates to the Ida Group of claims, including the Black Jack. The reported history and geological background of the claims are included in the article.

The conclusions of the witnesses regarding the mineralizations on the claims varied. The Government witnesses concluded that a prudent person would not be justified in expending further labor and means on the claims with a reasonable prospect of success in developing a valuable mine. Mr. C. F. Pruess, Jr., who testified on behalf of the Contestees, expressed the opposite conclusion and other Contestee witnesses stated that there was sufficient mineralization to stimulate interest and that further prospecting and exploration would be justified.

There was sufficient evidence at the hearing to conclude that the land upon which the claims are located is mineral in character. Consequently, the sole question to be determined is whether there has been a discovery of a valuable mineral deposit on each of the claims within the meaning of the mining laws.

The mining laws require the discovery of a *valuable mineral deposit* within the limits of a claim prior to its location. 30 U.S.C. Sec. 22; *Waskey* v. *Hammer*, 223 U.S. 85 (1912); *United States* v. *Wilmot D. Everett et al.*, A-27010

(October 17, 1955); *United States* v. *Josephine Lode Mining and Development Company,* A-27090 (May 11, 1955). The requirements of the statute concerning discovery are met where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. *United States* v. *M. W. Mouat et al,* 61 I.D. 289 (1954) and cases cited therein.

Oregon Basin Oil and Gas Company, 50 L.D. 253 (1923) citing *Castle* v. *Womble,* 19 L.D. 455 (1894) and *Jefferson-Montana Copper Mines Co.,* 41 L.D. 320 (1912) makes crystal clear that "discovery" upon which a claimant relies must be of a *particular deposit,* actually discovered, which warrants further expenditure of time and money in its development. The discovery, to satisfy the requirements of the law, means more than the showing only of isolated bits of mineral not connected with or leading to substantial value. *United States* v. *Frank J. Miller,* 59 I.D. 446 (1947).

The Contestees contended in effect that the claims are located in a recognized mining district, that a vein or lode has been identified on each claim, that gold, silver, or other valuable mineral has been found in place and verified by the numerous samples and assay reports secured by both parties and that this is sufficient to satisfy the discovery requirements of the mining laws. In support of this contention the Contestees cited *United States* v. *Merger Mines,* Coeur d'Alene 013942, Contest No. 977, Idaho (January 19, 1954), *United States* v. *A. A. M. Arnold, et al,* Coeur d'Alene 013984, Contest 978, Idaho (April 8, 1954) and *United States* v. *C. F. Smith,* 66 I.D. 169 (April 30, 1959).

The two Coeur d'Alene decisions are based on factual conclusions that surface indications have been found which have in numerous occasions within the district led to valuable deposits at great depth. The Director then found that from this factual conclusion a prudent man would be induced to believe that a valuable deposit had been found which would justify expenditures in the exploration and development of the deposit and consequently that there had

Rose, and smaller veins were exposed on the Big Rock and Oregon Claims.

Numerous samples were taken and assayed by the parties at locations shown on Exhibits A, 1 and 8. Selected samples taken from small lenses or pods within the vein structures had indicated assay values up to $85.98 a ton (Sample 21, Exh. W from the discovery cut on the Wild Rose). Other samples taken across the width of the vein structures a short distance away, often revealed values of little or nothing. The mineralization on the group of claims was described by a Government witness as being short, nonpersistent stringers of quartz that would pinch and swell and disappear and then come back again.

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There was sufficient evidence at the hearing to conclude that the land upon which the claims are located is mineral in character. Consequently, the sole question to be determined is whether there has been a discovery of a valuable mineral deposit on each of the claims within the meaning of the mining laws.

The mining laws require the discovery of a *valuable mineral deposit* within the limits of a claim prior to its location. 30 U.S.C. Sec. 22; *Waskey* v. *Hammer,* 223 U.S. 85 (1912); *United States* v. *Wilmot D. Everett et al.,* A-27010

(October 17, 1955); *United States* v. *Josephine Lode Mining and Development Company*, A-27090 (May 11, 1955). The requirements of the statute concerning discovery are met where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. *United States* v. *M. W. Mouat et al*, 61 I.D. 289 (1954) and cases cited therein.

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The Contestees contended in effect that the claims are located in a recognized mining district, that a vein or lode has been identified on each claim, that gold, silver, or other valuable mineral has been found in place and verified by the numerous samples and assay reports secured by both parties and that this is sufficient to satisfy the discovery requirements of the mining laws. In support of this contention the Contestees cited *United States* v. *Merger Mines*, Coeur d'Alene 013942, Contest No. 977, Idaho (January 19, 1954), *United States* v. *A. A. M. Arnold, et al*, Coeur d'Alene 013984, Contest 978, Idaho (April 8, 1954) and *United States* v. *C. F. Smith*, 66 I.D. 169 (April 30, 1959).

The two Coeur d'Alene decisions are based on factual conclusions that surface indications have been found which have in numerous occasions within the district led to valuable deposits at great depth. The Director then found that from this factual conclusion a prudent man would be induced to believe that a valuable deposit had been found which would justify expenditures in the exploration and development of the deposit and consequently that there had

been a discovery of a valuable mineral deposit within the meaning of the mining laws. In the Smith case, the Department upheld a hearing officer's decision that there had been a discovery of a valuable deposit. This decision was based on the conclusion that there was sufficient evidence to support the hearing officer's finding of fact that because of the quantity and quality of the minerals found within the claims a prudent man would be warranted in the expenditure of his labor and means in an effort to develop a paying mine.

There was ample evidence at the hearing that veins or lodes containing non-persistent stringers of quartz with gold, silver, or other valuable minerals had been identified on each of the claims. The history of other claims in the area and the limited amount of surface or near surface production in the district, together with the limited quality or quantity of minerals on the claims is not conducive to the belief that a valuable mineral deposit has been found or can be identified either on the surface or at depth. The mineral showings on the claims suggest that the further expenditures of time and means on the claims would be directed toward the exploration for such a deposit rather than toward the development of a deposit which has been found. Therefore, I conclude that there has not been a discovery of a valuable mineral deposit within the mining laws as interpreted by the Department on any of the claims remaining in issue.

Accordingly, I declare that the Big Mac, Little Mac, Oregon, Big Rock, Wild Rose and Buckskin Lode Claims are null and void for lack of a valid discovery. The protest against the Black Jack Claim has been dismissed for the reasons set forth herein.

This decision becomes final 30 days from its receipt unless an appeal to the Director, Bureau of Land Management, is filed. If an appeal is taken, there must be strict compliance with the regulation in 43 CFR, Part 221. (See enclosed Form 4-1364).

If an appeal is taken by C. F. Pruess, Sr., et al, the adverse party to be served is:

Office of the Regional Solicitor
U.S. Department of the Interior
P.O. Box 3537
Portland 8, Oregon.

If an appeal is taken, the amount of the filing fee will be computed on the basis of $5.00 for *each* mining claim included in the appeal. If the appeal covers all six claims adversely affected by this decision, the total filing fee is $30.00.

GRAYDON E. HOLT,
Hearing Examiner.

Enclosure

Distribution:

Office of the Regional Solicitor,
U. S. Dept. of the Interior,
P.O. Box 3537,
Portland 8, Oregon.

Jennie Bulfer,
123 S. Sherwood Ave.,
Fort Collins, Colorado.

Ray Harrison,
Fallon, Nevada.

Glenn Beale,
Potter, Nebraska.

Roy N. Gordon,
c/o Mrs. Renius,
1848 Carnahan Drive,
Grants Pass, Oregon.

C. F. Pruess, Sr.,
1010 N. W. "A" Street
Grants Pass, Oregon.
(Cert. Mail)

Hazel Van Allen Price
1511 Summit Avenue,
Marshalltown, Iowa.

W. J. Gordon,
915 - 11th Street,
Menomonie, Wisconsin.

Standard Distribution

MINING CLAIMS • 5 *Discovery*

A valid discovery upon a mining claim is made where there is discovered a mineral-bearing vein possessing in and of itself a present or prospective value for mining purposes. The showing must reveal the probability of a mineral deposit of commercial value i.e., one that can be mined at a profit. *United States* v. *C. F. Pruess Sr., et al.*, Contest 0-213 (Oregon)

(August 2, 1960).

In reply refer to:

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

Contest No. 0-213 (Oregon)

5.04g
August 2, 1960.

Certified Mail
Return Receipt Requested

DECISION

Buckskin, Wild Rose, Oregon, Big Mac, Little Mac, and Big Rock Lode Mining Claims, situated in secs. 25 and 26, T. 35 S., R. 5 W., W.M. Oregon.

UNITED STATES,

v.

C. F. PRUESS, SR., EXECUTOR, W. J. GORDON, GLENN BEALE, JENNIE BULFER, RAY HARRISON, ROY N. GORDON, HAZEL VAN ALLEN PRICE AND ANY UNKNOWN HEIRS OR DEVISEES OF IDA G. ARCHERD, DECEASED.

Decision Affirmed

The contestees, above named, have appealed from a decision of the Hearing Examiner dated January 12, 1960, declaring the Buckskin, Wild Rose, Oregon, Big Mac, Little Mac and Big Rock lode mining claims null and void. The claims were declared invalid for want of discovery.

After mineral examination of the mining claims listed in mineral patent application, Oregon 05396, the Bureau of Land Management initiated this contest proceeding. The complaint listed the six mining claims involved in this appeal as well as the Black Jack, the seventh mining claim in the group known as the Ida Group. The complaint charged

that the land embraced within the Ida group is nonmineral in character and that minerals have not been found within the limits of each claim in sufficient quantities to constitute valid discoveries. The charges against the Black Jack were withdrawn at the opening of the hearing; that claim has been clear-listed for patent, and is not involved in this appeal.

The Ida Group was originally located in 1890 and taken over by the Granite Hill in 1904. It was relocated in 1920; Archerd acquired the property in 1924. Most of the workings in the group predate 1924, but many of those workings have been cleaned out and additional exploration was done with a view of establishing discovery to allow the issuance of patent. Mr. Pruess has been acquainted with the mine since about 1930; he is the attorney and executor of the Archerd estate. The mine has not been operated on a commercial scale in the memory of witnesses for the contestees.

The Ida Group is situated about 8 miles northeast of Grants Pass, Oregon, in an area where there has been mineral activity for well over 70 years. The mining claims are alleged to contain valuable mineral deposits of gold, silver, copper, nickel, molybdenum, gallium, etc. There are patented mining claims within close proximity to the Ida group. Although some of the mines in the Grants Pass area have been past producers, none are presently producing (TR 570).

The ultimate question to be resolved is whether the claims, subject of this appeal, have been validated by discovery. Since our decision is made on that point it is not necessary to inquire concerning the mineral character of the land. For that reason charge (a) that "the lands embraced within the claims is nonmineral in character" is dismissed. Since the good faith of the mining claimants is not in question any testimony concerning the timber value of the land is disregarded. In this connection it is merely necessary to note that if a valid discovery were demonstrated, then, regardless of timber values, the claims would be subject to patent if all else be regular. Because of the holdings in this decision it will not be necessary to determine what effect,

if any, results from the fact that the claims may cover O & C lands. (Act of April 8, 1948 (62 Stat. 162)).

The Government's evidence consisted of testimony by expert mineral examiners. They showed that they had conducted several examinations of each of the mining claims and viewed physical exposures of stringers, veinlets and minor lenses or pods of mineral bearing rock on each. Mr. Pruess and/or other agents of the contestees had accompanied the examiners, and specimens for assays were taken where suggested by the contestees in the customary fashion. (TR 43) Assay reports showed values from traces to substantial value per ton. The assay values, they testified, were not indicative of good ore because there was no continuity of structure, and because the cost of mining substantial quantities of worthless rock to recover the values of the veinlets or pods far exceeded the mineral values and rendered those values inconsequential.

The Government witnesses showed that although veinlets had been exposed at the time of the earlier visits, bulldozing (in furtherance of demonstrating a discovery) by the appellants had completely obliterated traces, in many instances of those veinlets or seams. "But that structure is completely bulldozed out. That structure doesn't exist any more. It's gone with the bulldozer." (TR 200). And again in TR 205 it was stated "There were a bunch of seams in there that had—that evidently didn't have enough quartz to fill them completely with quartz. They came out some places and they were altered and they were just mud, nothing filled. They would go along and there would be another pod of quartz, but there was no quartz vein as such in there except some small short non-persistent stringers running through that, and each one of those structures, it's borne out by the fact that every time you bulldozed, those things disappeared. More of them appear, that's true, but the vein to follow, any one given vein, it would be an impossibility. You could follow the structure, but not any given vein."

Even bearing in mind that the Black Jack had been clear-listed, and the proximity of nearby patented mining claims, it was the opinion of the examiners that greater values would not be encountered at depth and that a prudent man would not be justified in the further expenditure of labor and means, with a reasonable prospect of success, in developing a valuable mine within the limits of any of the six claims.

The evidence offered by the contestees concerning visible evidences of mineralization did not differ materially from the Government's. However, the contestees attempted to show that the Black Jack veins continued into these claims and that evidence of surface mineralization, when considered in connection with the proximity to patented claims, would lead a prudent man to the conclusion that greater values exist at depth, and that these claims are of present and prospective value for mining purposes justifying a prudent man in the further expenditure of labor and means with a view to developing these properties.

Mr. Pruess, Jr., one of contestees' witnesses, on cross-examination stated that he would not now spend time or money in a mining operation on the Oregon and Big Rock but would spend his time "further prospecting" those claims (TR 400, 454), and that he would be satisfied to do further exploratory work on the Wild Rose. (TR 427).

Mr. Ramp, an expert geologist, on behalf of the contestees, testified that known mines compared with the Ida Group contain dissimilarities in the structures compared (TR 515) and that as to these claims he "wouldn't say as to whether any of them would qualify as something other than a prospect" and "that further prospecting, further prospect, would be necessary, yes." (TR 536).

Another witness appearing for the contestees, Mr. Pressler, a consulting mining metallurgical engineer, stated that the Big Mac is a "prospect" and is not in the position where one can start a mining job and he would not be prepared to

start mining on the Big Mac. "There is only one property in this whole group that is in any way close to the position of developing enough to justify the starting of mining operations and that is the main workings on the Black Jack * * *." (TR 588).

Concerning the Buckskin, Mr. Pressler said—"all three of the ore bodies would only weigh a few hundred pounds and they could weigh a ton or more." (TR 619). In answer to the question (concerning an assay sample of a lens from the Wild Rose)—"Then, whether there was any continuity would have to be found by further prospecting, I suppose?" he answered—"Yes, that is right." (TR 621). He also testified that the costs of mining the known veinlets would far exceed the value of the recovery and "I don't think any engineer in his right mind would have a mineable width of ore if it was five inches, unless it was pure gold." (TR 641). And, as to whether the known veinlets would lead to value at depth he said—

> "Well, actually, mining in this part of the country has not progressed to the point where we can definitely conclude that we have a deep mineral province and that veins would progress to some depths or intermediate depths or anything that would be similar to some of the other larger mining districts we have in the United States, and you might say the country is in an undeveloped point. And it is like some of the better geologists and experts in that field say, the country justifies further exploration and I think Dr. Wells was quoted from the back of one of these quadrangle maps as recommending that the properties that have strong mineralizations, strong structures, should be explored to depth. That is all I can say." (TR 631).

Another of contestees' witnesses, Mr. George C. Heikes, a consulting economic geologist, stated, concerning the Wild Rose—"It is all part of the same area, and the surface geology indicates enough structure and so forth to make it worthwhile further prospecting." (TR 670). By prospect-

ing "Yes, I mean exploration work." (TR 671). He further stated on cross-examination—"* * * I would follow this up and bulldoze systematically all along, trying to outline this vein from an exploration point of view. * * * I would suggest undertaking some drilling on the zone of hydrothermal showing on the contact * * * at the eastern end of the Wild Rose * * *. And I would, after doing some preliminary bulldozing on the Big Rock and Oregon, I would try to see what structures could be developed up in this area that might prove worth-while." (TR 675, 677).

Mr. Pruess, Sr., testified to the fact that the veinlets uncovered to date justify the belief that pay ore would be encountered and that a prudent man is justified in the further expenditures of labor and means on the six claims.

On the evidence of record the Hearing Examiner found:

> "The history of other claims in the area and the limited amount of surface or near surface production in the district, together with the limited quality or quantity of minerals on the claims is not conducive to the belief that a valuable mineral deposit has been found or can be identified either on the surface or at depth. The mineral showings on the claims suggest that the further expenditures of time and means on the claims would be directed toward the exploration for such a deposit rather than toward the development of a deposit which has been found."

He thereupon declared the six mining claims null and void. The appellants contend the decision is contrary to law and the weight of evidence.

A valid location of a mining claim can be made only if a valuable mineral deposit has been discovered within the limits of the claim. 30 U.S.C., secs. 22 and 23. A discovery of such deposits which will sustain a location has often been held to be one which warrants a man of ordinary prudence in the further expenditure of time and money with a reasonable prospect of success in the development

of a paying mine. This "prudent man" rule of discovery, enunciated in *Castle* v. *Womble,* 19 L.D. 455 (1894), *Chrisman* v. *Miller,* 197 U.S. 313 (1905), *Jefferson-Montana Copper Mines Co.,* 41 L.D. 320 (1912) and others, is applicable in determining whether a valid location within the meaning of the mining laws has been demonstrated within the Ida Group. Under the prudent man rule the actual disclosure of valuable ore is not essential to a sufficient and adequate discovery. The showing must, however, reveal the *probability* of a mineral deposit of commercial ore—in other words—the probable existence of a mineral deposit that may sustain operations. A valid discovery is made where there is discovered a mineral-bearing vein possessing in and of itself a present or prospective value for mining purposes.

Even though pay ore is not exposed, the validity of discovery would be established if the evidences of mineralization are such as would induce a prudent man in further expenditures in the probability that the veins exposed will lead to greater values if mining operations for the exploitation of the claims are undertaken. By "probability" we do not mean mere conjecture, hopes or beliefs that a deposit may exist—but if similar geological conditions elsewhere have led to greater values at depth, then it would appear that a prudent man would be justified in undertaking mining operations to follow the lode in the anticipation, the probability, of encountering richer (commercial) values on these claims. See *Oom Paul Consolidated Mining Company,* D-22955 (July 23, 1915); *Lincoln Mining Co.,* A-21978 (December 22, 1939) and compare, *East Tintic Consolidated Mining Claim,* 40 L.D. 271 (1911).

By their patent application the contestees asserted they had complied with the applicable mining laws and the claims had been each validated by discovery. See *Foster* v. *Seaton,* 271 F. 2d 836 (1959). Conceding that mineral bearing veins have been exposed on each claim, the question for determination is whether the evidences of mineralization indicate the existence or *probable* existence of "valu-

able mineral deposits". Where the total mineral value of stringers, veinlets, pods or lenses on a claim may "weigh a few hundred pounds and they could weigh a ton or more" and even though the ore may assay $85.98 a ton, and the cost of extraction even without considering the costs of transportation, milling, etc., exceeds the recoverable values, a prudent man would not be justified in the further expenditure of labor and means in an attempt to establish a paying mine on the property; in such event a discovery of "valuable mineral deposits" has not been demonstrated and the claims are null and void for lack of discovery. The evidence adduced concerning each and every one of the six claims shows to a certainty that the known visible deposits are not conducive to the establishment of a mining operation on any one of them which could even justify the cost of extraction.

The dissimilarities to other claims in the area are such that no inference may be gained leading to the belief that greater values will be encountered at depth in the Ida Group. Considering the history of other claims in the area and the geology of the mining district, it appears that greater values will not be reached at depth.

While the evidence would justify a prudent man in further prospecting and exploring these claims, it falls far short of demonstrating the probability of an existing vein possessing in and of itself a present or prospective value for mining purposes, i.e., a vein (or series of veins) that can be exploited at a profit. The testimony of Mr. Pruess, Sr., supports this finding. He indicated the hope and belief that further operations on these claims would disclose valuable bodies of ore capable of supporting successful mining operations. In substance he reiterated the opinion of appellants' other witnesses—that these claims are good "prospects" justifying expenditures not for exploitation but in further exploration. But justification of expenditures for such purpose is not expenditure with a reasonable prospect of success in *developing* a paying mine as is re-

quired to demonstrate a valid discovery within the meaning of the mining laws.

The appellants urge presumption of validity attaching to these claims because of the age of the locations. However, we find although a presumption of validity may be indulged in between parties claiming adversely to the locator, there is no such presumption between the Government and a person claiming adversely to it. Cf. *Union Oil Company of California et al.*, 65 I.D. 245 (1958); *Clipper Mining Company* v. *Eli Mining and Land Company*, 194 U.S. 220 (1904); *Belk* v. *Meagher*, 104 U.S. 279 (1881).

The decision of the Hearing Examiner is affirmed.

The contestees, appellants herein, are allowed the further right of appeal to the Secretary of the Interior in accordance with the regulations contained in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be computed on the basis of $5 for *each* mining claim included in the appeal. If the appeal covers all mining claims adversely affected by this decision the total filing fee is $30.00. In taking an appeal there must be strict compliance with the regulations.

In the event of an appeal the adverse party to be served is:

Regional Solicitor
Department of the Interior
P. O. Box 3537
Portland 8, Oregon

CHARLES P. MEAD,
Acting Director.

Enclosure

DISTRIBUTION:

Mr. C. F. Pruess, Sr., Attorney at Law (Certified Mail)
Regional Solicitor
Geological Survey (3)
Mrs. Jennie Bulfer (Regular Mail)
Mr. Ray Harrison (Regular Mail)
Mr. Glenn Beale (Regular Mail)
Mr. Roy N. Gordon (Regular Mail)
Mrs. Hazel Van Allen Price (Regular Mail)
Mr. W. J. Gordon (Regular Mail)
Minerals Staff Officer (3)
Hearing Examiner, Graydon E. Holt (Regular Mail)
Hearings Administrative Officer
Appeals List No. 1
BF

78710-60

97839-61

UNITED STATES,

v.

C. F. PRUESS, SR., ET AL.

Decided Aug. 22 1961

A-28641

Mining Claims: Lode Claims—Mining Claims: Discovery

A valid discovery on a lode claim requires finding valuable deposits of mineral in rock in place so located that the vein or mineral-bearing body may be followed with reasonable hope and assurance of ultimately developing a valuable mine. Reports of assays showing that occasional samples of material from lode mining claims contain high values for gold are not conclusive evidence of a valid discovery but other relevant factors are to be considered, such as the extent of mineral deposits on the claims and the number of samples of material assayed from the claims showing only a trace or no mineral values, in determining whether a discovery of valuable minerals has been made.

Mining Claims: Determination of Validity—Mining Claims: Discovery

A decision declaring six lode mining claims null and void for lack of discovery is proper where evidence at a hearing supports the conclusion that there has not been a discovery of minerals of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing valuable mines, although he might be justified in further exploration of the claims with the view of making a discovery.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington 25, D. C.

A-28641

Contest 0-213 (Oregon)

Lode mining claims declared null and void
Affirmed

UNITED STATES,

v.

C. F. PRUESS, SR., EXECUTOR OF ESTATE OF IDA G. ARCHERD, DECEASED, ET AL.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

C. F. Pruess, Sr., and others [1] have appealed to the Secretary of the Interior from a decision of August 2, 1960, by the Acting Director of the Bureau of Land Management which affirmed a decision by a hearing examiner holding null and void six lode mining claims in sections 25 and 26, T. 35 S., R. 5 W., W. M., near Grants Pass, Oregon. The claims are known as the Ida Group and consist of the Buckskin, Wild Rose, Oregon, Big Mac, Little Mac, and Big Rock.

On March 25, 1957, an application for patent, Oregon 05396, was filed for these and one other claim in the Ida Group, namely the Black Jack. In a notice of February 12, 1958, the United States contested the validity of the claims included in the patent application charging (a) that the land embraced within the claims is nonmineral in character, and (b) that minerals have not been found within the limits of the claims in sufficient quantities to

[1] The other contestants, all of whom are also appellants, are: W. J. Gordon, Glenn Beale, Jennie Bulfer, Ray Harrison, Roy N. Gordon, Hazel Van Allen Price, any unknown heirs or devisees of Ida G. Archerd, deceased.

constitute a valid discovery. The contestees denied the charges and a hearing thereon was held before an examiner at Grants Pass, Oregon, on October 1, 2, 20, and 21, 1959.

At the outset of the hearing, the Government moved to have the complaint against the Black Jack dismissed as an examination of the claim made after the complaint was filed established that a valuable mineral deposit had been discovered thereon. The motion was granted, and the hearing involved the six remaining claims in the Ida Group.

The record shows that mining has been carried on in this area and that the claims here involved have been known since 1890. Some of these claims have been mined intermittently in the past, but not within the last thirty years or more (Transcript of hearing on Contest No. Oregon 213, pp. 692-693).[2] The principal evidence concerning minerals on the claims consisted of assay reports on a large number of samples of material from the claims. As the examiner's decision noted, some of the assay reports showed that the samples contained very high values for gold. This was true of several samples submitted by the Government as well as of samples assayed and submitted for the contestees. Nevertheless, assay reports on approximately 100 samples taken from the claims by mineral examiners for the Government showed that more than one-half of the samples contained only a trace of gold or no gold whatsoever. Evidence at the hearing indicated that although the lands on which the claims are located contain discontinuous stringers of quartz with gold, silver, or other valuable minerals, no solid mineralized structure or vein could be identified (Tr. 202-205, 254-256, 335, 407, 621). Witnesses for the contestees testified that mineral deposits were exposed on the claims which would justify further prospecting and exploration (Tr. 398, 400, 427, 536, 586-588, 669-671, 674-677). Government mineral examiners testified that a per-

[2] Unless otherwise noted, page numbers hereafter will refer to this transcript.

son of ordinary prudence would not be warranted in the further expenditure of time and effort and money to develop a paying mine on the contested claims (Tr. 68, 94, 152, 158-159, 171).

By decision of January 12, 1960, the examiner held that the land upon which the claims are located is mineral in character. The decision pointed out that a mining claim is not valid in the absence of a discovery of a valuable mineral deposit within its limits and that a discovery of mineral means that minerals have been found of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine (*Chrisman* v. *Miller,* 197 U. S. 313 (1905)). The examiner held that the discovery upon which a claimant relies must be of a particular deposit, actually discovered, which justifies the further expenditure of time and money in its development. Although evidence at the hearing indicated that non-persistent and discontinuous stringers of minerals had been identified on each of the claims, the examiner concluded that a valuable mineral deposit within the meaning of the mining laws has not been discovered, that is, there has been no discovery of a mineral in a mass so located that the vein or mineral-bearing body can be followed with reasonable hope and assurance of ultimately developing a paying mine (*Freeman* v. *Summers et al.,* 52 I. D. 201 (1927)). Accordingly, the examiner held the claims null and void for lack of discovery.

After a careful review of the extensive evidence submitted at the hearing in this case, the Acting Director affirmed the examiner's decision. Both the Acting Director's and the examiner's decisions distinguished the claims here involved, on which minerals have been found warranting further prospecting and exploration, from claims on which a valid discovery of minerals sufficient to support a patent application has been made (*cf. Freeman* v. *Summers, et al. supra,* 204-205). The correctness

of the determination that a valid discovery has not been made on these claims is in issue on this appeal.

The record indicates that one of the appellants and his son have worked extensively on the claims and that this appellant has great confidence that the claims are valuable (Tr. 681-690). Moreover, occasional samples of material from the claims showed very high gold values. Nonetheless, the contention on this appeal that the mineral values on these claims as shown by assay reports are much greater than those on other claims patented within recent years by the United States, some of which patented claims are in the vicinity of these claims, is of no avail. Each contest is decided on the basis of specific conditions affecting the individual claims in the particular contest, and assay reports on samples of material from a claim are neither an absolute test nor the sole basis for determining whether a claim is valid (see *Cataract Gold Mining Co. et al.*, 43 L. D. 248, 252-254 (1914); *Big Pine Mining Corporation*, 53 L. D. 410 (1931)). Thus, if as is suggested by this record, a disproportionately large amount of overburden has to be mined to recover valuable deposits of mineral, and the cost of mining substantial quantities of worthless rock to recover the values far exceeds the value of the deposits, then the fact that occasional mineral samples containing high values are found on a claim is not conclusive evidence that there has been a valuable discovery of minerals within the meaning of the mining laws.

Furthermore, a vein or lode, to be locatable and patentable under the mining laws, must be a rock in place bearing deposits of valuable minerals (*Henderson et al.* v. *Fulton*, 35 L. D. 652 (1907)). Where, as in the instant case, no persistent vein or mineral-bearing body is exposed, but only discontinuous stringers of mineral deposits appear, such condition is to be weighed, along with other relevant factors (including assay reports showing mineral values of the material, and evidence of the amount of overburden which must be removed to recover valuable min-

erals) in determining whether there has been the required discovery of a mineral-bearing body which can be followed with reasonable hope and assurance of ultimately developing a paying mine. *Freeman* v. *Summers et al. supra; United States* v. *Duvall and Russell*, 65 L. D. 458 (1958); *United States* v. *Santiam Copper Mines, Inc.*, A-28272 (June 27, 1960).

A review of the entire record in this case indicates that even though enough minerals have been found to warrant further exploration of these claims, there has been no discovery of actual mineral values necessary to validate a mining location. None of the matters asserted on this appeal provides a basis for modifying the determination that a person of ordinary prudence would not be justified in the further expenditure of his money and means in attempting to develop a paying mine on the claims. Accordingly, for the reasons discussed herein and in the Acting Director's decision, the determination that these claims are null and void is proper.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A (4)(a), Departmental Manual; 24 F. R. 1348), the decision of the Acting Director, Bureau of Land Management, is affirmed.

(Sgd) EDWARD W. FISHER,
Deputy Solicitor.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

C. F. PRUESS, SR., EXECUTOR, ET AL.,

PLAINTIFFS,

V.

STEWART L. UDALL, Secretary of the Interior,

DEFENDANT.

CIVIL NO. 1331-62

MEMORANDUM

This is a hearing on remand from the Court of Appeals of an action to review and set aside a decision of the Secretary of the Interior which had denied the plaintiffs' application for a patent on certain public lands claimed to contain valuable minerals. The application for patents was made pursuant to the provisions of 30 U.S.C. §§ 22, 23, 26 and 29. These statutes provide that any person may make explorations on public lands and may obtain a patent therefor if he discovers valuable minerals on such lands.

The Supreme Court has held that metals, such as gold and silver, must be found on the land in such quantities as to invite the expenditure of time and money for their development and justify a prudent person in doing so, Chrisman v. Miller, 197 U.S. 313, 321-323.

After a lengthy hearing conducted before a Hearing Examiner, the Secretary of the Interior held that on the lands in question the metals discovered were not in sufficient quantities to meet the foregoing definition and, consequently, denied the application.

The plaintiffs brought this action contending that the finding of fact made by the appropriate agency of the Department of the Interior, should be set aside.

The Government introduced evidence before the Hearing Examiner on the part of a number of expert witnesses to the effect that the minerals found on the land in question were not in sufficient quantities to justify the expenditure of money for their exploitation. (Susie, Tr. pp. 45-47, 49-53, 93-94, 151-2, 157-8, 161, 163, 171, 174, and 207. Pressler, Tr. pp. 588 et seq.)

In fact, one of the plaintiffs' witnesses on cross-examination, in effect, gave testimony supporting the contentions of the Government (Zeigler, Tr. p. 275).

The plaintiff introduced evidence to the contrary. He testified in person and in addition called his son as a witness and also one other person. Thus there was a clear-cut issue of fact which the Department of the Interior decided against the plaintiff. There was substantial evidence in the

record as a whole to support these adverse findings and, therefore, the Court may not set them aside. The plaintiffs' memorandum submitted in this Court is merely a plea to the effect that his testimony should have been accepted in preference to that of the Government experts.

The opinion of the Court of Appeals contains an unintentional and inadvertent error of fact. It states that the "trial judge" had denied a motion to transfer this case to the District of Oregon. I was the trial judge. The motion was not presented before me and was not passed upon by me. An adequate examination of the record will show that two motions for transfer were made at different times prior to the trial and were passed upon by other judges, no doubt in the motions branch of the Court.

The motion for a transfer has now been renewed and has been carefully considered by this Court. The Court is of the opinion that the interests of justice would not be served by transferring the case to Oregon at this juncture. The only question involved in this action is to be determined on the basis of the administrative record. The plaintiff has been able to present his views in writing, which have been carefully considered. No reason is discernible for transferring this case at this time and placing a burden on still

another District Judge and on another Court of Appeals. The situation might well be different if the action were one in which testimony were to be taken. Accordingly, the motion for a transfer is denied.

The record amply sustains the decision of the Secretary of the Interior and the complaint will be dismissed on the merits.

/s/ Alexander Holtzoff
United States District Judge.

January 4, 1966.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C. F. PRUESS, SR., Executor, et al., Plaintiffs,	)	
v.	)	Civil No. 1331-62
STEWART L. UDALL, Secretary of the Interior, Defendant.	)	

ORDER

This case having come on for hearing on remand from the Court of Appeals, and on plaintiffs' motion to transfer the case to the United States District Court for the District of Oregon, and the Court having considered the briefs previously filed by the plaintiffs and defendant, having heard argument by counsel for the defendant, having examined and considered the administrative record, and, on January 4, 1966, having entered a memorandum containing findings of fact and conclusions of law, it is

ORDERED, ADJUDED AND DECREED, that the plaintiffs' motion for transfer is hereby denied, the decision of the Secretary of the Interior disallowing the plaintiffs' mining claims is hereby sustained, and the complaint is dismissed on the merits.

/s/ Alexander Holtzoff
United States District Judge